95-1401

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1995

ROBERT LIBUTTI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the reach of the bank fraud statute, 18 U.S.C. § 1344, extends to deceptive conduct which is aimed at a third party and which neither deceives the bank nor is intended to deceive the bank?

2. Whether broadening the possible bases for conviction from those set forth in a formally filed bill of particulars constitutes an impermissible amendment of the indictment?

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below were the same as in the caption.

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Petitioner prays for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The court of appeals affirmed without opinion the judgment of the district court in a Judgment Order reprinted in the appendix at App. 1. The opinion of the district court, which is unreported, is reprinted in the appendix at App. 3.

JURISDICTION

The judgment of the court of appeals was entered on November 17, 1995, and Petitioner's petition for rehearing was denied on January 25, 1996. App. 60. This petition for a writ of certiorari is filed within ninety days of the order denying rehearing, in compliance with Rule 13 of this Court's rules. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V, provides in pertinent part:

> No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment of a grant jury. . . .

Rule 7 of the Federal Rules of Criminal Procedure provides in pertinent part:

> The Indictment and the Information
>
> * * *
>
> (c) Nature and Contents.
>
> (1) In General. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. . . .
>
> * * *
>
> (f) Bill of Particulars. The court may direct the filing of a bill of particulars. A motion for a bill of particulars may be made before arraignment or within ten days after arraignment or at such time as the court may permit. A bill of particulars may be amended at any time subject to such conditions as justice requires.

Former Title 18, United States Code, Section 1344(a)[1] provided:

> (a) Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a federally chartered or insured financial institution; or
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> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial

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[1] The current version of the statute, reflecting amendments enacted November 29, 1990, does not vary in any way material to the issues presented in this petition.

> institution, by means of false or fraudulent pretenses, representations or promises, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

1. Even though no bank was deceived or intended to be deceived by a loan made to a nominee for Petitioner Robert LiButti with the knowledge and approval of the bank president, Petitioner was indicted, tried and convicted in the District of New Jersey for defrauding a bank in 1986, and conspiring to do so. Petitioner, a successful thoroughbred racehorse consultant who in the mid-1980's fell victim to an extraordinarily acute compulsive gambling disorder, was also convicted of evading the payment of federal tax liabilities for four tax years,[2] although the jury's verdict may have been based on evasive conduct that was omitted from a highly specific bill of particulars yet vigorously asserted by the prosecution at trial.

The "Bank Fraud"

2. In 1986, after the Office of the Comptroller of the Currency ("OCC") found that loans made by Urban

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[2] The tax years were 1970 and 1971 – as to which the interest due had greatly inflated the liability – and 1987 and 1988, when Petitioner's financial condition was in a shambles due to his compulsive gambling disorder. Petitioner was also convicted of failing to pay the tax liabilities for 1987 and 1988.

National Bank ("UNB") to Petitioner violated regulatory limits for loans to individuals, Theodore Kruckel, UNB's president, knowingly made a $1.25 million loan to Petitioner through a third party, James Roberts, who was a friend of Petitioner and an acquaintance of Kruckel. Roberts, who understood that he himself was not required to repay the loan, agreed with Kruckel and Petitioner to be a nominee in order to help pay down Petitioner's overdrafts at UNB. It was Roberts' understanding that the overdrafts needed to be covered so that the OCC examiners would find that the lending limit violations had been eliminated. Of the $1.25 million, $750,000 was used by Petitioner to pay down those loans, eliminating the lending limit violations and avoiding imposition of penalties against the bank. When the first $23,000 interest payment became due, Petitioner made a deposit into an account at UNB opened in Roberts' name and paid the interest from it.

The note signed by Roberts listed a racehorse as collateral. Subsequently, Roberts signed a renewal note he received from Kruckel which was uncollateralized. Although the loan was ultimately defaulted upon, none of the bank witnesses at trial testified that the bank was in any way deceived.

3. The district court, in rejecting Petitioner's post-trial motion for a judgment of acquittal on the bank fraud counts, concluded that even if the loan was motivated by a desire to cure the lending limit violations which were the subject of scrutiny by bank examiners, the bank itself was nevertheless defrauded because (1) not *all* the proceeds of the $1.25 million loan, but only $750,000 of it, was used by Petitioner to pay down the outstanding

loans; (2) even if used to reduce Petitioner's indebtedness to the bank, the bank suffered a loss of funds because the substitution of valueless consideration (Roberts' promise) reduced the bank's ability to extend loans to persons of substantial income and ability to repay; and (3) the loan was not repaid. (App. 36-39)

The Evasion of Payment of Tax Liabilities

4. The indictment alleged that Petitioner evaded, not the assessment, but the payment of income taxes due and owing by concealing from the Internal Revenue Service ("IRS") the existence, amount and location of available monies and placing his funds beyond the service of process. (CA App. 135) Pursuant to Federal Rule of Criminal Procedure 7(f), the Government formally filed a bill of particulars "amplifying the Indictment in this matter" by setting forth specific and detailed "affirmative acts of evasion of payment," as follows:

> (a.) The conversion of four Rolls Royce Convertibles by defendant LiButti to $610,000 in cash. The cars were purchased from Carriage House Motor Cars, Ltd., New York, New York, by Trump Plaza for defendant LiButti. On or about March 25, 1987, December 1, 1987, June 13, 1988, and August 8, 1988 defendant LiButti sold the cars back to Carriage House Motor Cars, Ltd. for $135,000, $140,000, $150,000, and $185,000, respectively, for a total of $610,000.
>
> (b.) From on or about January 25, 1985 through approximately June, 1987, defendant LiButti resided at 183 W. Saddle River Road, Saddle River, New Jersey. During this period of

> time defendant LiButti hid his ownership interest in the home. All title and interest in this residence was held by his wife, Joan LiButti.
>
> (c.) From on or about June 15, 1988 through approximately March, 1993, defendant LiButti resided at 2 Pell Farm Road, Saddle River, New Jersey. During this period of time defendant LiButti hid his leasehold and ownership interest in the home. All title and interest in this residence was held by defendant's daughter, Edith LiButti.
>
> (d.) From on or about February 12, 1985 through January 5, 1987 defendant LiButti hid his ownership interest in the horse Groovy through a series of transactions between his company, Buck Chance Stable, John Ballis, and Lion Crest Stable, a company nominally owned and operated by his daughter, Edith LiButti. Defendant LiButti also hid his ownership interest in the horse Groovy by using Theodore Kruckel as a nominee owner. (CA App. 148-49)

Notwithstanding this highly specific bill of particulars – none of which included any allegation that Petitioner banked under another individual's name or account – at trial the Government argued to the jury that Petitioner did so, suggesting that his deposits of loan payments into his daughter's bank account reflected sham loans and maintaining that this use of his daughter's account was one of the steps taken by Petitioner to hide his assets from the IRS. (CA App. 3045, 3048-49) The prosecutor stated:

> The evidence here shows that Robert LiButti was putting his income into Edith LiButti's bank account.

> Now, ladies and gentlemen, we all know how hard it is to keep track of our own bank accounts, particularly trying to balance checkbooks, can you imagine how difficult it was for Robert LiButti to keep track of what was his and what his daughter's to run an account within an account? Why would somebody do that? What practical reason could there be for somebody doing something like that? Why doesn't he have the bank account? How does he run his business without a bank account? Why is he using his daughter's bank account? The only explanation is because if he had a bank account in his name with millions of dollars in it, he knew the IRS was going to seize it and take it. And how do you know that? Because Agent Clark told you that one of the things Collection did was put a levy on his Urban National Bank account. Didn't lead to anything there as there was no money in it. But that's all the lesson LiButti needed, better not to have a bank account or get a lien on it and I'll lose whatever money in there. So he doesn't have one in 1988, he uses his daughter's bank account, she doesn't have a problem with the IRS. (CA App. 3046-47)

In response to defense counsel's objection that this argument went "well beyond the affirmative acts, it gets into an area that's not charged here," the district court simply advised the jury that "it's not charged as an affirmative act that the defendant was misusing his daughter's bank account," but that "it may be evidential of other conduct in the case." (CA App. 3047) After the prosecutor made a similar argument in the Government's rebuttal summation (CA App. 3183), the defense again

objected (CA App. 3199), but the court expressly overruled the objection and, erroneously recalling its earlier limiting instruction, refused to instruct the jury that the conduct relating to the bank account was not an "affirmative act." (CA App. 3206, 3208) In the court's charge, it instructed the jury that in determining whether the defendant "committed a requisite act of evasion, you may only consider *evidence* or lack of evidence of the four alleged acts of evasion," which the court had read. (CA 3244-45; emphasis added.)

6. In the court of appeals, the Government maintained that the prosecutor's argument that Petitioner banked under his daughter's name and account was perfectly proper because this was just "evidentiary detail" concerning one of the affirmative acts that was set forth in the bill of particulars – that Petitioner hid his leasehold and ownership interest in a residence in which his daughter held all title and interest. (Gov. CA Brf. at 24-25) According to the Government, for an amendment there must be "a modification in the elements of the crime charged," and the elements of evading the payment of federal tax liabilities – willfulness, a deficiency, and an affirmative act of evasion – were not "altered" by its argument, so no amendment occurred. (Gov. CA Brf. at 24)

7. The court of appeals affirmed without opinion.

REASONS FOR GRANTING THE PETITION

I

The Reach of the Bank Fraud Statute, 18 U.S.C. § 1344, Does Not Extend to Deceptive Conduct Which Is Aimed at A Third Party And Which Neither Deceives The Bank Nor Is Intended to Deceive The Bank.

1. This Court has consistently construed federal criminal statutes narrowly despite broad interpretations by the courts of appeals. *See, e.g., United States v. Aguilar,* 115 S.Ct. 2357 (1995) (18 U.S.C. § 1503); *Hubbard v. United States,* 115 S.Ct. 1754 (1995) (18 U.S.C. § 1001); *Ratzlaf v. United States,* 114 S.Ct. 655 (1994) (31 U.S.C. § 1342). The bank fraud statute, 18 U.S.C. § 1344, however, continues to be a fertile field for imaginative application by the Government and creative interpretation by the lower courts.

Enacted as part of the Comprehensive Crime Control Act of 1984, the bank fraud statute has never been addressed by this Court, although lower court perceptions of the statute's general scope have varied substantially, with some maintaining that the statute was intended to be construed narrowly while others declare quite the opposite. *Compare United States v. Blackmon,* 839 F.2d 900, 906 (2d Cir. 1988) ("It would seem odd indeed if the same committee that expressed concern about judicial expansion of coverage under the wire and mail fraud statutes[3] [18 U.S.C. §§ 1341, 1343] intended a similar fate

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[3] The court in *Blackmon* was referring to the House Judiciary Committee which, in considering the proposed statute, was concerned about the expansive case law development of the mail and wire fraud statutes, 18 U.S.C.

for the bank fraud statute it was proposing"), *with United States v. Solomonson*, 908 F.2d 358, 364 (8th Cir. 1990) ("section 1344 must be given a broad reading that is in accordance with sections 1341 and 1343").

Not surprisingly, therefore, the statute has been given diverse interpretations when applied to concrete factual patterns. *Compare United States v. Miller*, 70 F.3d 1353 (D.C. Cir. 1995) (§ 1344[2] violated by entering victim's ATM card and PIN number into machine and making withdrawal), *with id.* (Sentelle, C.J., concurring) (such conduct does not fall within § 1344[2] and majority's theory would criminalize conduct "far beyond what a legislative body, or a citizen contemplating the statute, could conceivably expect these statutes to encompass").

The Third Circuit has interpreted the statute perhaps most broadly of all, suggesting that any act of deceit in bank transactions constitutes bank fraud. *United States v. Goldblatt*, 813 F.2d 619, 624 (3d Cir. 1987) ("fraud is measured in a particular case, by determining whether the scheme demonstrated a departure from fundamental honesty, moral uprightness, or fair play and candid dealings in the general life of the community"); *see also United States v. Schwartz*, 899 F.2d 243, 246 (3d Cir. 1990). One

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§§ 1341, 1343, and had noted that the "current scope of the wire and mail fraud statutes is clearly greater than that intended by Congress." 839 F.2d at 906, *citing* H.R.Rep No. 901, 98th Cong. 2d Sess. 4 (1984). The Committee stated its belief "that while the additional activity that could thus be brought within the purview of the language might well be reprehensible, and probably should be criminal, due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage." *Id.*

source of difficulty is the structure of the statute, which provides:

> (a)Whoever knowingly executes, or attempts to execute, a scheme or artifice –
>
> (1) to defraud a federally chartered or insured financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by or under the custody or control of a federally chartered or insured financial institution, by means of false or fraudulent, pretenses, representations or promises, shall be [punished].

In *United States v. Schwartz*, 899 F.2d 243, the Third Circuit categorically held that "[i]nasmuch as these two provisions are clearly disjunctive, . . . a person may commit a bank fraud without making false or fraudulent pretenses, representations or promises, as this is 'the plain meaning' of the statute." *Id.* at 246, *citing Garcia v. United States*, 469 U.S. 70 (1984). The court added that where an indictment charges both aspects of the offense, the defendant could be convicted if proved guilty under either.[4] *Id.*

In *McNally v. United States*, 483 U.S. 350, however, this Court expressed a view at odds with *Schwartz*'s categorical position on the significance of the disjunctive. After noting that the mail fraud statute criminalized

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[4] Petitioner was charged under both subparagraphs of § 1344(a) and could have been convicted if the Government proved he was guilty of either. On the other hand, the conviction cannot stand if one of the alternate bases was a legally inadequate theory. *See Griffin v. United States*, 502 U.S. 46, 112 S.Ct. 466, 474 (1991).

schemes "to defraud" or "for obtaining money or property by means of false pretenses," the *McNally* Court stated that "[b]ecause the two phrases identifying the proscribed schemes appear in the disjunctive, it is *arguable* that they are to be construed independently," and observed that each of the courts of appeals that had addressed the issue, including the Third Circuit, took that position. The Court continued, however, that "the words 'to defraud' commonly refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value by trick, deceit, chicane or overreaching.' " *McNally*, 483 U.S. at 358 (citation omitted). Thus, the Court concluded, the second phrase – for obtaining money or property by means of false pretenses – "simply made it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property." *Id.* at 359.

In light of *McNally*'s analysis, the court in *United States v. Blackmon*, 839 F.2d at 900, declined to adopt the district court's conclusion there – similar to that in *Schwartz* – that the structure of § 1344(a) reflects two separate intentions because connected in the disjunctive. *Id.* at 905 n. 5. The *Blackmon* court stated: "as the Supreme Court recently observed with respect to the federal mail fraud statute . . . (upon which the bank fraud statute was largely modelled), terms connected in the disjunctive need not always be construed independently so that the limits applicable to one term are inapplicable to the second, especially when such a construction would leave the statute's 'outer boundaries ambiguous.' " *Id., quoting McNally*, 438 U.S. at 360.

2. Here, Petitioner submits that, whether charged under § 1344(a)(1) or § 1344(a)(2) or both, the bank fraud statute in every case requires deceit and, specifically, deceit *aimed at the bank. See, e.g., United States v. Hammen*, 977 F.2d 379, 384 (7th Cir. 1992) (loan officer violated statute by approving loan to nominee for the benefit of one DeToro whom the loan officer knew the bank had barred from conducting any business at the bank). To the extent that cases like *United States v. Schwartz*, 899 F.2d 243, indicate otherwise – *e.g.*, that false representations or omissions directed at a bank are unnecessary for conviction under § 1341(a)(1) and departure from "fundamental honesty, moral uprightness, fair play and candid dealings" is enough, *see id.* at 247 – certiorari should be granted to dispel such a boundless view of the statute.[5]

In the Third Circuit, no obstacle to conviction is apparently presented by facts like those of this case, where any deceit in using a nominee in connection with a loan was aimed at the OCC, not the bank.[6] In other courts, however, the result would be otherwise. For example, in *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993), the court held that the defendant did not violate § 1344 when, in order to obtain for himself the proceeds of an Internal Revenue Service tax refund check made out

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[5] It was presumably such a view that caused the district court here to charge the jury, over objection, that the prosecution "is not required to prove that the bank was misled or influenced by the defendant's statements." (CA App. 3269) The Government, on appeal, maintained that this was "a correct statement of the law." (Gov. CA Brf. at 43 n. 14, *citing Schwartz*.)

[6] This would appear to be the view of the Fifth Circuit also. *See United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992).

to a homeless person, he opened a bank account in the name of a fictitious corporation allegedly owned by the homeless person – who was tricked into endorsing the check and signing a bank signature card – deposited the IRS check, then wrote checks against the accounts. The court pointed out that the defendant may well have committed fraud *against the IRS*, but not the bank, even though "the false representations made by Davis in establishing the account were done in order to get the proceeds of the check from the bank." *Id.* at 246; *see also United States v. Orr*, 932 F.2d 330 (4th Cir. 1991) (defendant who opened bank account under false name using false identification and wrote insufficient funds checks did not violate § 1344, since no evidence that use of false name was done with intent to defraud bank). Indeed, the mere use of a nominee to obtain a loan for another does not, without more, amount to a violation of the statute. *United States v. Hammen*, 977 F.2d at 384; *see also United States v. Bridges*, 820 F.Supp. 475 (W.D. Mo. 1993) (granting motion for judgment of acquittal where bank fraud conviction based on nominee loan).

With respect to the "scheme to defraud" clause of § 1344(a), the district court in its charge to the jury (CA App. 3267) treated the word "deceive" as if it were an intransitive verb needing no direct object,[7] whereas the

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[7] The court charged the jury: "With respect to the first method of violation, the phrase 'scheme or artifice to defraud' means any deliberate plan of action or course of conduct by which someone engages in a scheme designed *to deceive* in order to obtain something of value." (CA App. 3267; emphasis added.) This instruction was presumably based on a sentence in

statute demands that *the bank* be the object of the deception. As the court stated in *United States v. Stavroulakis*, 952 F.2d 686 (2d Cir. 1992), regarding that clause:

> This much is clear: a conviction under the "scheme to defraud" clause of the bank fraud statute requires that the defendant engage in or attempt to engage in a pattern or course of conduct designed *to deceive a federally chartered or insured financial institution* into releasing property with the intent to victimize the institution by exposing it to actual or potential loss.

Id. at 694 (emphasis added); *cf. United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987) ("misrepresentations amounting only to a deceit are insufficient to maintain a mail or wire fraud prosecution").

As to the "false or fraudulent pretenses, representations or promises" clause, it is clear that such deceptive conduct must also be directed at the bank, not a third

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United States v. Goldblatt, 813 F.2d at 624, omitting an object for the verb "deceive."

Borrowing additional general language from *Goldblatt*, the district court's charge also provided the broadest mandate to find bank fraud by instructing the jurors that a "scheme or artifice to defraud may be found where there has been a departure from fundamental honesty, moral uprightness or fair play and candid dealings." (CA App. 3267) In *Williams v. United States*, 458 U.S. 279 (1982), this Court cautioned that when interpreting a criminal statute which does not explicitly reach the conduct in question, an expansive reading should not be based on subjective and variable underpinnings. *Id.* at 286. The *Goldblatt* language, whatever its accuracy as a general proposition, is surely too "subjective and variable" a basis for construing § 1344, and far too open-ended to provide a jury with any reasonable parameters for convicting a defendant.

party, because the clause requires that the defendant "knowingly provide materially false information *in order to induce a loan.*" *United States v. Sapp*, 53 F.3d 1100, 1102 (10th Cir. 1995) (emphasis added); *see also United States v. Morgenstern*, 933 F.2d 1108, 114 (2d Cir. 1991) (affirming conviction under § 1344(a)(2) because defendant "obtained the money only by means of fraudulent conduct directed at the bank [which] induced the bank to allow deposit of funds . . . and their subsequent withdrawal"). Thus, a false statement to a third party – and particularly a false statement of which the bank is aware – cannot constitute a violation of this clause, because it is not made in order to induce the bank to act, i.e., it is not directed at the bank.

Here, where the use of a nominee to obtain the loan was known to the bank and thus cannot be said to have induced it to make the loan; where there was no evidence that the bank was deceived or was intended to be deceived; and where, to the contrary, the trial testimony indicated that the deceit was directed at the OCC, such activity at most, to use the words of the House Committee that proposed the statute, "might well be reprehensible, and probably should be criminal, [but] due process and notice argue for prohibiting such conduct explicitly, rather than through court expansion of coverage." H.R.Rep No. 901, 98th Cong. 2d Sess. 4. Since Congress did not prohibit such conduct, the scheme charged here does not fall within the purview of § 1344.

Of course, a given bank official's knowledge of a deception would not in itself insulate a defendant from liability under § 1344, so long as the deception was directed at the bank. For example, in *United States v.*

Hammen, 977 F.2d 379, where the bank's loan officer approved a loan to a nominee for the benefit of a person whom the loan officer knew the bank had barred from conducting business at bank, the statute was violated because the deceit was aimed at the bank. But here, where the use of the nominee was proposed by the bank president, where the deception in using a nominee was aimed at the OCC, and where none of the bank witnesses at trial testified that the bank was in any way deceived, it would be sheer speculation to surmise that the deception was directed at the bank.[8]

3. The district court's analysis of this issue was completely off-base. The rationale that, despite the actors' motive to cure the bank's lending limit violations which were the subject of scrutiny by bank examiners, the bank itself was nevertheless defrauded because not *all* the proceeds of the $1.25 million loan was used by Petitioner to pay down the outstanding loans does not affect at all the crucial fact that the bank was neither deceived nor intended to be deceived. Nor does the rationale that, even if used to reduce Petitioner's indebtedness to the bank, the bank suffered a loss of funds because the substitution of valueless consideration (Roberts' promise) reduced the bank's ability to extend loans to persons of substantial income and ability to repay. As to the district court's third

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[8] Moreover, there was no evidence that Petitioner believed or had reason to believe that the bank president lacked authority to permit a nominee loan by the bank. *Cf. United States v. D'Amato*, 39 F.3d 1249, 1261 (2d Cir. 1994) (reversing conviction for mail fraud on false pretenses theory where defendant attorney disguised his services by billing through third party at behest of corporate client).

rationale – that the bank was defrauded because the loan was not repaid – this is a classic *post hoc ergo propter hoc* fallacy: the subsequent default on the loan establishes a prior design to deceive the bank.

Accordingly, since application of the bank fraud statute to the charged conduct extends its reach impermissibly, the Court should grant certiorari and so hold. *See generally Dunn v. United States*, 442 U.S. 100, 113 (1979) ("to ensure that a legislature speaks with special clarity when marking the boundaries of criminal conduct, courts must decline to impose punishment for actions that are not 'plainly and unmistakably' proscribed") (citation omitted); *McNally v. United States*, 483 U.S. at 360 (if Congress desires mail fraud statute to reach intangible rights, "it must speak more clearly than it has").

II

Broadening The Possible Bases for Conviction from Those Set Forth in A Formally Filed Bill of Particulars Constitutes An Impermissible Amendment of The Indictment.

1. Certiorari should also be granted to address the extent to which a bill of particulars bars the prosecution from broadening the bases for conviction beyond those specified in the bill.

The Fifth Amendment, which states that no person shall be held to answer for an infamous crime "unless on a presentment or indictment of a grand jury," forbids actual or constructive amendment of the charging terms of an indictment by the prosecutor, because such an amendment subjects a defendant to the risk of conviction

for an offense not found by the grand jury. *Stirone v. United States*, 361 U.S. 212 (1960). An impermissible amendment alters the charging terms of the indictment "by *broadening* the possible bases for conviction from that which appeared in the indictment." *United States v. Miller*, 471 U.S. 130, 138 (1985) (emphasis the Court's).

If a bill of particulars particularizes the nature of charges which are only generally stated in the indictment, then the bill must be considered part of the indictment itself. This is so because the bill of particulars sets forth the specific crime or crimes for which the grand jury actually indicted the defendant. As such, like the indictment itself, the bill of particulars restricts the prosecutor from roaming beyond its confines in order to obtain a conviction. If it were otherwise, the prosecution would be free to obtain a conviction for a crime never voted upon by the grand jury, in violation of a defendant's rights under the Fifth Amendment. *See generally Russell v. United States*, 369 U.S. 749, 770 (1962) (defendant had right to have adequately informed grand jury return indictment and not to have indictment effectively rewritten by prosecutor). Accordingly, Petitioner submits, where a prosecutor broadens the bases for conviction from those specifically set forth in a bill of particulars, this constitutes an impermissible amendment of the indictment.[9]

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[9] Although Fed. R. Crim. P. 7(f) provides that "a bill of particulars may be amended at any time subject to such conditions as justice requires," that provision would violate the Fifth Amendment if it permitted an amendment which broadened the bases for conviction beyond the crime found by the grand jury.

Although generally agreeing that a bill of particulars is not a discovery device, courts of appeals have differed over its true nature. In *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985), the court subscribed to the position that a bill of particulars is indictment-like in nature:

> Historically and functionally, the bill of particulars is closely related to the indictment. Bills of particulars, relative to indictments, have a brief history. Nevertheless, that history closely ties the bill of particulars to the indictment. Originally, indictments set forth the accusation in great detail and there was no need for supplementation. The modern trend, however, has been towards more skeletal accusations combined with procedures providing access to the omitted details if the defense has a legitimate need for them. Federal Rule of Criminal Procedure 7(f) provides the opportunity for such access. That rule authorizes the court to "direct the *filing* of a bill of particulars" (emphasis added). This is in marked contrast to the provisions of Rule 16, which authorize the court to direct that the government *"furnish to the defendant"* certain specified items of discovery. In this context, we believe Rule 7(f) provides some evidence that bills of particulars were regarded by the drafters of the rules as supplements to the indictment rather than as pretrial discovery.
>
> Turning to the functions performed by a bill of particulars, we again find them more akin to the functions of an indictment. [A] bill of particulars, like the indictment, is designed to define and limit the government's case.

Id. at 1111 (emphasis the court's) (citations and footnote omitted). The Eleventh Circuit, on the other hand, has

declined to automatically accord to a bill of particulars the status of a supplement to an indictment, at least where the "bill" merely facilitates voluntary discovery. *United States v. Anderson*, 799 F.2d 1438, 1440 (11th Cir. 1986).

2. Here, the bill of particulars was clearly no mere discovery vehicle. It was formally filed with the district court as a bill of particulars "amplifying the Indictment in this matter" by setting forth four specific and detailed "affirmative acts of evasion of payment" with respect to the evasion of tax payment counts. (CA App. 148) These were the conversion to cash of Rolls Royces purchased by Trump Plaza for Petitioner, who sold them back to the car dealer; the hiding of Petitioner's ownership interest in a home in Saddle River, New Jersey, the title and interest in which was held by his wife; the hiding of Petitioner's leasehold and ownership interest in another home in Saddle River, New Jersey, the title and interest in which was held by his daughter; and the hiding of Petitioner's ownership interest in a racehorse through transactions between his company and a company nominally owned by his daughter and through using Kruckel as a nominee owner. (CA App. 148-49) It must be presumed, therefore, that these were the acts presented to the grand jury and the acts which formed the basis for the grand jury's return of the indictment.

Yet the prosecutor argued to the jury that one of the steps taken by Petitioner to hide his assets from the IRS was that he banked in his daughter's name or account, and the prosecutor suggested that the deposits of loan payments into his daughter's bank account reflected sham loans. *See United States v. McGill*, 964 F.2d 222, 230

(3d Cir. 1992) (one example of affirmative act of evasion of payment is depositing money in bank accounts of family members). This was a far broader, indeed quite different, allegation from any affirmative act set forth in the bill of particulars. As such, it constituted an impermissible amendment of the indictment. *See United States v. Miller*, 471 U.S. at 144 (reaffirming proposition concerning the impermissibility of actual additions to the offenses alleged); *see also Stirone v. United States*, 361 U.S. at 273 (impermissible amendment where Government introduced evidence of interference with steel exportation whereas grand jury charged only interference with sand exportation).

Of course, the constitutional principle that the bases for conviction may not be broadened beyond those found by the grand jury becomes ineffectual if the Government, as here, is permitted to position additional criminal conduct as mere "evidentiary detail," and if an element of the crime must actually be *changed*, not just broadened, for there to be an amendment. Although prosecutors, in resisting demands for bills of particulars, routinely, and often successfully, protest that the defendant is seeking "evidentiary detail," invocation of that phrase in the context of avoiding the consequences of straying from a bill of particulars during a trial cannot be permitted to explain away the fundamental constitutional principle prohibiting amendments.

That an impermissible amendment occurred here and that the guilty verdict may have been improperly based on evasive conduct omitted from the bill of particulars, but vigorously argued to the jury, is not undone by the district court's inconsistent rulings on the defendant's

objections or by the court's instructions, which advised the jury that the defendant's "misusing his daughter's bank account" may be "evidential of other conduct in the case" (CA App. 3047) and that in determining whether the defendant committed a requisite act of evasion, the jury could consider "evidence" of the four alleged acts of evasion. (CA App. 3244-45) Just as describing additional criminal conduct as "evidentiary detail" should not camouflage the true nature of allegations extending beyond the ones set forth in a bill of particulars, instructing the jury that it may consider this additional conduct as "evidence" of the properly alleged allegations in determining the defendant's guilt similarly masks the fact that the bases for conviction have been substantially broadened.

Certiorari should therefore be granted in order to establish that broadening the bases for conviction from those specifically set forth in a formally filed bill of particulars is proscribed by the Fifth Amendment.[10]

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[10] In the event the Court, in reaching the merits, were to determine that the prosecutor's argument did not rise to the level of an impermissible amendment under the facts of this case, this Petition also requests the Court to address whether the argument constituted a fatal variance from the offenses particularized in the bill of particulars.

CONCLUSION

The petition for a writ of certiorari should be granted.

Dated: New York, New York
February 29, 1996

Respectfully submitted,

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Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5000

UNITED STATES OF AMERICA

v.

ROBERT LIBUTTI, *Appellant*

Appeal from the United States District Court
for the District of New Jersey
D.C. Criminal No. 92-cr-00611-2
(District Judge: Honorable Jerome R. Simandle)

Argued: November 13, 1995

Before: BECKER, SCIRICA, *Circuit Judges*, and
COHILL, *District Judge*.*

JUDGMENT ORDER

After considering the contentions raised by appellant, to wit:

1. That the court below erroneously sustained the sufficiency of the evidence supporting the bank counts;

2. That the court below erroneously sustained the sufficiency of the evidence supporting the evasion count;

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* Honorable Maurice B. Cohill, Jr., United States District Judge for the Western District of Pennsylvania, sitting by designation.

3. That the prosecution constructively amended or prejudicially varied from the evasion count and the bank counts;

4. That the unfair prejudice caused by the prosecution's closing and rebuttal statements violated due process;

5. That the court below unfairly prejudiced the defense by erroneously overruling defense objections to preassessment evidence relevant only to issues to which the defense offered to stipulate and uncharged conduct;

6. That the court below unfairly prejudiced the defense by erroneously refusing to instruct the jury on several essential defense theories; and

7. That the court below unfairly prejudiced the defense by erroneously permitting the prosecution to impeach Mr. Libutti with a seventeen-year-old conviction; it is

ADJUDGED AND ORDERED that the order of the district court of September 6, 1994 be and is hereby AFFIRMED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

Attest:

/s/ P. Douglas Sisk
P. Douglas Sisk, Clerk

NOV 17 1995

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	Criminal Action No. 92-611 (JBS)
v.	:	
ROBERT LIBUTTI,	:	OPINION
Defendant	:	(Filed Sep. 6, 1994)

APPEARANCES:

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SIMANDLE, District Judge:

On February 18, 1994, a unanimous jury returned a verdict of guilty against defendant, Robert LiButti, on all five counts upon which it deliberated. Those counts, contained in a Fourth Superseding Indictment returned on January 7, 1994, charged the defendant with evading the payment of income taxes for the years 1970, 1971, 1987 and 1988 in violation of 26 U.S.C. § 7201 (Count 1); wilful

failure to pay taxes for the years 1987 and 1988 in violation of 26 U.S.C. § 7203 (Counts 2 and 3); conspiracy to commit bank fraud in violation of 18 U.S.C. § 371 (Count 4); and scheming to commit bank fraud in violation of 18 U.S.C. § 1344 (Count 5). A sixth count contained in the indictment charged defendant LiButti with the unlawful possession of firearms by a convicted felon in violation of 18 U.S.C. §§ 922(g)(1) and 2. The trial was bifurcated such that the trial on Count 6 would proceed only after the jury had returned its verdict on Counts 1 through 5.[1] The matter is presently before the court upon the motion of defendant for a verdict of acquittal pursuant to Rule 29(c), Fed.R.Crim.P., and alternatively for a new trial pursuant to Rule 33, Fed.R.Crim.P., with regard to Counts 1 through 5.

The trial against defendant LiButti was lengthy and complex, spanning six weeks (including some lost days when weather conditions did not permit trial to be held). This trial followed the severed trial of co-defendant Theodore Kruckel, an alleged co-conspirator in the bank fraud with which Mr. LiButti was charged; Mr. Kruckel's trial similarly lasted several weeks, and it resulted in a conviction on a single count of issuing bank checks for a loan of $1.25 million to James Roberts without authority

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[1] The trial on Count 6 has thus far ended in a mistrial on two occasions, the first because of publicity and the second because of defendant's medical condition. The Order granting defendant's motion for mistrial to seek medical treatment of a longstanding cardiac problem without prejudice to retrial, was entered on April 18, 1994.

of the board of directors of Mr. Kruckel's bank in violation of 18 U.S.C. § 1005. Numerous pre-trial and evidentiary motions were made by each defendant, and the case has been the subject of numerous Opinions, both written and oral. All of defendant Kruckel's post-trial motions were denied in an Opinion and Order filed May 5, 1994, and Mr. Kruckel was sentenced on May 17, 1994. Only that background information necessary to the disposition of the instant post-trial motion will be set forth herein.

Discussion

I. Defendant's Argument that He is Entitled to A Judgment of Acquittal On All Counts

Defendant argues that the conviction on each count cannot be sustained and that he is, accordingly, entitled to a judgment of acquittal. In assessing a motion for a verdict of acquittal, the court must determine whether, viewing the evidence in a light most favorable to the Government, there is substantial evidence upon which a reasonable jury could have based a verdict. *See United States v. Shirk*, 981 F.2d 1382, 1387 (3d Cir. 1992); *United States v. Eufrasio*, 935 F.2d 553, 577 (3d Cir.), *cert. denied*, 112 S.Ct. 340 (1991). The court must not invade the jury's province by reevaluating the credibility of witnesses, *see United States v. Mariani*, 725 F.2d 862, 865 (2d Cir. 1984); evidentiary sufficiency is the sole issue for the court's consideration. *See United States v. Cicco*, 938 F.2d 441, 446 (3d Cir. 1991). "The evidence need not unequivocally point to the defendant's guilt as long as it permits the jury to find the defendant guilty beyond a reasonable

doubt." *United States v. Pungitore*, 910 F.2d 1084, 1129 (3d Cir. 1990).

A. Count 1

Count 1 charged in pertinent part that "[f]rom in or about July 1986 and up to and including the date of this Indictment," Mr. LiButti "knowingly and willfully attempted to evade and defeat the payment of a large part of" his tax deficiencies for tax years "1970, 1971, 1987 and 1988 by failing and refusing to pay said taxes, concealing and attempting to conceal from the Internal Revenue Service the existence and amount of his available monies and the location thereof, and placing his funds beyond the service of process." That charge was further defined as follows in a Bill of Particulars filed by the Government on January 13, 1994, pursuant to this court's Order filed August 13, 1993 directing the Government to specify the affirmative acts of evasion referenced in the indictment:

> 1. The conversion of four Rolls Royce Convertibles by defendant LiButti to $610,000 in cash. The cars were purchased from Carriage House Motor Cars, Ltd., New York, New York, by Trump Plaza for defendant LiButti. On or about March 25, 1987, December 1, 1987, June 13, 1988, and August 8, 1988 defendant LiButti sold the cars back to Carriage House Motor Cars, Ltd. for $135,000, $140,000, $150,000, and $185,000, respectively, for a total of $610,000[2] [hereinafter "the Rolls Royce act"].

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[2] Only one of the four automobile acts went to the jury, the court having granted defendant's motion for judgment as a

2. From on or about January 25, 1985 through approximately June, 1987, defendant LiButti resided at 183 W. Saddle River Road, Saddle River, New Jersey. During this period of time defendant LiButti hid his ownership interest in the home. All title and interest in this residence was held by defendant's wife, Joan LiButti [hereinafter "the 183 W. Saddle River Road act"].

3. From on or about June 15, 1988 through approximately March, 1993, defendant LiButti resided at 2 Pell Farm Road, Saddle River, New Jersey pursuant to a lease purchase agreement. During this period of time defendant LiButti hid his leasehold and ownership interest in the home. All title and interest in this residence was held by defendant's daughter, Edith LiButti [hereinafter "the 2 Pell Farm Road act"].

4. From on or about February 12, 1985 through January 5, 1987 defendant LiButti hid his ownership interest in the horse Groovy through a series of transactions between his company, Buck Chance Stable, John Ballis, and Lion Crest Stable, a company nominally owned and operated by his daughter, Edith LiButti. Defendant LiButti also hid his ownership in the horse Groovy by using Theodore Kruckel as a nominee owner [hereinafter "the Groovy act"].

Id.

These allegations were charged as violative of 26 U.S.C. § 7201, which is a felony offense for evasion of

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matter of law at the close of the Government's case as to the other three, pursuant to Rule 29, Fed. R. Crim. P.

payment of tax.[3] As the jury was instructed, the elements of the felony of evasion of income tax are (1) the existence of a tax deficiency, (2) an affirmative act of evasion, and (3) wilfulness. *United States v. McGill*, 964 F.2d 222, 229 (3d Cir. 1992) (citing *Sansone v. United States*, 380 U.S. 343 (1965)). It was stipulated, and the jury was instructed, that the first element was satisfied, because the defendant was assessed on July 11, 1986 as owing $35,881 in taxes and penalties for tax year 1970 and $1,427,299 for tax year 1971, and was also assessed on November 20, 1989 as owing $1,219,306 in taxes for tax year 1987 and $227,845 for tax year 1988; as of the date of trial, defendant had failed to pay any portion of those tax assessments, despite earning millions of dollars in reported income from 1986 onward. Defendant's motion focuses primarily upon the second element of the offense, raising questions about whether the acts as charged and proved constitute affirmative acts of evasion of payment of the assessed taxes.

"An affirmative act [of evasion of payment] is anything done to mislead the government or conceal funds to avoid payment of an admitted and accurate deficiency." *McGill*, 964 F.2d at 230. In general, "affirmative acts associated with evasion of payment involve some type of

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[3] That section provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof shall be fined not more than $100,000 . . . or imprisoned not more than 5 years, or both, together with the costs of prosecution.

concealment of the taxpayer's ability to pay his or her taxes or the removal of assets from the reach of the Internal Revenue Service." *Id.* One example of an affirmative act of evasion of payment is the placing of assets in the names of others. *Id.* The Groovy act, the 2 Pell Farm Road act, and the 183 W. Saddle River Road act (as defined *supra*) each charge defendant with such conduct.

Ordinarily, a single act of evasion will suffice to support a verdict. *Id.* at 229. This was the theory upon which the case proceeded, as reflected in the instruction delivered to the jury. The only wrinkle introduced by defendant on the instant motion is that the instruction requested by the Government and delivered to the jury described the one affirmative act requirement as requiring proof of "at least one specific act of evasion charged after October 29, 1986 which constitutes a continuous course of conduct designed to evade the payment of his tax deficiencies," Jury Charge at 48 (*see also* Jury Charge at 47 and 49)[4], and thus defendant contends that certain

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[4] Statute of limitations concerns were the motivation for the Government's request and the court's instruction concerning a "continuous course of conduct". The initial indictment on this charge was filed on October 29, 1992. The indictment, and each superseding indictment, charged defendant with certain affirmative acts of evasion initiated more than six years prior to the return of the initial indictment; such acts could only form the basis for a conviction if they were part of a course of conduct with respect to the particular act of evasion which continued beyond October 29, 1986, which is the earliest date within the statute of limitations. *See United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2332 (1993) (It is permissible under section 7201 "to charge tax evasion covering several years in a single count as a 'course of conduct' in

of the acts charged, standing alone, are insufficient to support a conviction. For example, defendant opines that if the evidence is found to only support the Rolls Royce act and not to support the return of a verdict on any of the other three acts, the motion for judgment of acquittal would need to be granted because that act took place on a single day, June 13, 1988, and would thus be insufficient to support the charge of a continuous course of conduct.

The defendant's argument deprives the continuous course of conduct instruction from its context. The elements of section 7201 regarding evasion of payment do not require proof of an unceasing effort by the defendant to evade all payment of taxes. Instead, as noted above under *McGill* and *Sansone*, and as the jury was clearly instructed, the crime is complete upon proof beyond a reasonable doubt of (1) the existence of a tax deficiency, (2) an affirmative act of evasion, and (3) wilfulness. The affirmative act of evasion may indeed be a single act, *McGill* at 229, so long as the other elements are present. The "continuous course" referred only to the fact that conduct predating the October 29, 1986 statute of limitations date could not form the basis for affirmative act of evasion unless the jury found that the defendant's evasion affirmatively continued beyond October 29, 1986.[5] It

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circumstances 'where the underlying basis of the indictment is an allegedly consistent, long-term pattern of conduct directed at the evasion of taxes for those years.' ") (quoting *United States v. Shorter*, 809 F.2d 54, 58 (D.C.Cir.), *cert. denied*, 484 U.S. 817 (1987)).

[5] *Id.* This requirement was imposed to assure that the defendant could not be convicted for any act of evasion that concluded before October 29, 1986, for reasons discussed at

cannot logically follow, however, that the Government had to prove that the defendant's evasion straddled the October 29, 1986 date with respect to either the 1988 Rolls Royce act or the 1988-93 2 Pell Farm act, since it is clear that proof of any one of the four alleged acts of evasion with willful intent to defeat the collection of the tax deficiencies is sufficient to support a conviction under section 7201. Finally, in order to prevail in his motion for acquittal, defendant must demonstrate that the evidence is insufficient as to *each* of the four affirmative acts of evasion, *Griffin v. United States*, ___ U.S. ___, 112 S.Ct. 466, 473 (1991); *United States v. Vastola*, 989 F.2d 1318, 1331 (3d Cir. 1993).

1. Rolls Royce act and 2 Pell Farm Road act

With these concepts in mind, I turn to an examination of the evidence adduced before the jury on each of the four affirmative acts charged in the indictment. The first act alleged in the Bill of Particulars is the Rolls Royce act; that act is best understood in conjunction with another alleged affirmative act of evasion, the 2 Pell Farm Road act. In June, 1988, defendant LiButti was presented with a Rolls Royce convertible from the Trump Plaza casino, which he frequented regularly and where he won and lost large amounts of cash, as a complementary gift or "comp" recognizing his status as a gambler of large sums of money, also called a "high roller." On June 13, 1988,

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length in the Opinion of this Court filed August 13, 1993 at pp. 32-36 (denying defendant's motion to dismiss Count 1 on statute of limitations grounds).

that Rolls Royce was converted into $184,000 when the defendant received title to the auto and immediately sold it back to Carriage House Motors In New York, according to the testimony of Michael Schudroff, president of Carriage House Motors. Schudroff testified that Trump purchased the Rolls Royce for LiButti for $199,288, paid in full by a Trump Plaza check to Carriage House. (Ex. 227.) LiButti and Schudroff "negotiated" a price at which LiButti sold the car back to Carriage House the same day for $184,000, which was issued to LiButti in two checks, one for $150,000 (Ex. G-230) and one for $34,000 (Ex. G-231).

Susan Grant, the IRS Revenue Agent who traced the proceeds of this transaction, testified that the defendant endorsed the $150,000 check (which were proceeds from this deal) over to his daughter, Edith LiButti, as a "repayment" of a "loan." She further testified that same $150,000 was ultimately used as part of a down payment on the house located at 2 Pell Farm Road being purchased for defendant and his wife by his daughter Edith. It was uncontested that the house was titled in Edith's name but lived in by defendant LiButti and his wife, Joan.[6] Thus

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[6] It was the defendant's theory that he and his wife resided at the property not because it was their home titled in the name of their daughter but because it was their daughter's home purchased by her as a real estate investment, and that it was preferable for Edith to have her parents, rather than a rent-paying tenant, residing at the home because an ordinary tenant would not be willing to vacate on short notice if a profitable sale was consummated. The jury was free to find Edith's explanation incredible and to accept the overwhelming proofs of the sham nature of Edith's ownership interest in defendant's home at 2 Pell Farm Road.

defendant converted a valuable tangible asset to cash and placed the cash in his daughter's account (and beyond the reach of the IRS).

Some background facts are in order to flesh out the transaction. There was uncontroverted testimony to the effect that defendant Robert LiButti had no bank account of his own during 1988. There was additional testimony offered by Agent Grant that during this time, after defendant had been assessed substantial tax liabilities, the defendant utilized and shared his daughter Edith's business bank account, the Lion Crest Stable account.[7] Concerning the house at 2 Pell Farm Road, the Government adduced evidence from the builder, Leonard Divak, that it was defendant LiButti, and not his daughter, who selected the model and negotiated the deal with Divak, and who made the decisions about the building. There was, in fact, substantial testimony concerning the defendant's involvement in various details of the home, including converting a maid's room into an office, choosing marble for certain areas of the house, and ripping out existing floors. These customized changes were dictated by defendant according to the constructing superintendent, Gary Pritchard, as shown in evidence. (Ex. G-249B, E, G, & I). Pritchard testified that defendant talked with him 15-20 times about the customized changes to his new

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[7] The Bill of Particulars did not charge as an affirmative act of evasion that defendant LiButti used his daughter's bank account to conceal his assets from the IRS. Nonetheless, testimony concerning his use of the bank account was admitted into evidence to a certain extent because it was highly relevant to other charged acts of evasion, including the 2 Pell Farm Road act and the Groovy act.

house, and that he never even met Edith LiButti until construction was finished. Similarly, Pritchard discussed all punch list items with defendant, not Edith. Leonard Divak's testimony confirmed these points. The jury could certainly find that this home was custom-finished to his specifications because he would be the de facto owner.

As to the financing of the purchase, the Government produced evidence that it was the defendant who provided $150,000 in cash as a down payment on the house. There was also testimony that it was the defendant who negotiated a lease option deal with the builder pursuant to which a non-refundable $200,000 deposit was required. A check from Edith LiButti's account was presented to Divak on April 29, 1988 to secure the home, but that check bounced. As a consequence, defendant personally delivered a $150,000 cash deposit to Gary Pritchard of Divak, which was later replaced by 2 checks from Edith LiButti's checking account totalling $200,000, as to which there was ample evidence that defendant's deposits to Edith's account formed the source of these checks.

Another $320,000 in checks from Edith's account was issued in June, 1988 to the builder for carpeting and payments on the home through the end of the year. Ms. Grant testified that such checks were drawn from Edith's account during June, 1988 despite the fact that at the beginning of the month, the account balance was merely $1,000, and Edith's own deposits were insubstantial that month. The money which ultimately flowed out came from deposits made by defendant LiButti into the account in the amounts of $150,000 and $250,000; the evidence showed that the checks for 2 Pell Farm Road were written

shortly after those deposits were made and that defendant LiButti was merely running his own money through Edith's account to fund his purchase of his own luxury home at 2 Pell Farm Road in Edith's name. One of those deposits, in the amount of $150,000, was the check dated June 13, 1988 from Carriage House Motors, which represented the sale of the Rolls Royce back to the dealership occurring on or about the same day when the Trump Plaza casino present [sic] this gift to defendant, as discussed above. (Ex. G-230). The $250,000 deposit on June 16, 1988 was a Trump Plaza check to Robert LiButti that he placed in Edith's account, Ex. G-290K, according to Agent Grant's testimony and bank records. From this infusion of $400,000, Edith wrote checks to Saddle River Associates (the seller of 2 Pell Farm Road) and to a carpeting company for furnishing 2 Pell Farm, Road, totaling $320,000 by the end of June, 1988. (Exs. G-290A through I.)

Defendant contended throughout the trial that the deposits made by him into his daughter's bank account were repayments of loans. Although the Government theorized that the list of loans and loan repayments maintained by defendant and his daughter was merely a mechanism devised by defendant to keep track of how much money each individual had in the shared bank account at any given time, there were no witnesses with first-hand knowledge who so testified. However, Edith LiButti seemed puzzled in her testimony regarding the nature and purpose of the alleged "loans" and repayments to her own account. It is defendant's position that absent such evidence of the sham nature of the loan transactions, the automobile act and the 2 Pell Farm Road

act must fail. Defendant argues that "these acts as charged rested on the fundamental premise that the loans were shams." Reply Br. at 9.

This argument misses the mark. The premise of the Rolls Royce act is that the car was a valuable asset of the defendant that was titled only momentarily before being converted into cash which was placed beyond the reach of the IRS by depositing the money into Edith's bank account. The premise of the 2 Pell Farm Road act is that the defendant's money, including his money from the sale of the Rolls Royce, was directly used to fund defendant's lease-purchase interest in the home (after being funnelled through Edith's checking account) and that defendant was the actual undisclosed owner of that interest.

The government's theories were supported by evidence of the deposit of money by defendant into Edith's bank account and the nearly contemporaneous use of those funds to purchase a home which defendant resided in and negotiated the purchase of, down to the most minute detail. Simply because the $150,000 check was endorsed as a repayment of a loan does not necessarily make it so, and the jury was free to reject such a theory, especially under the circumstances presented, where an exceedingly wealthy individual involved in substantial business and personal transactions had no bank account of his own during the relevant period of time. The evidence was sufficient to demonstrate beyond a reasonable doubt that Edith LiButti acted as a nominee owner for the residence of defendant and his wife, using funds derived from the defendant whose purpose was to purchase and reside in a luxury home beyond the reach of the IRS. There was ample evidence to support a finding that the 2

Pell Farm Road act and the Rolls Royce act were schemes to conceal assets of the defendant from the IRS. Although the foregoing finding is itself sufficient to sustain the verdict and to deny defendant's motion on Count 1, I consider the other alleged affirmative acts of evasion which were also charged under Count 1 for the sake of completeness.

2. The racehorse "Groovy"

I turn next to the affirmative act of evasion involving ownership of the thoroughbred racehorse named Groovy. The evidence suggested that defendant LiButti (1) bought 100 percent of the interest in Groovy from Edith LiButti for $350,000, and sold 50 percent of that interest to one John Ballis in February, 1986; (2) sold to and then repurchased from Edith his 50 percent interest in the horse in November, 1986; and (3) sold that 50 percent interest to Mr. Ballis in December, 1986 and January, 1987 for $450,000. Indeed, the defendant offered to stipulate that Mr. LiButti owned 50 percent of the interest in Groovy as of the July 11, 1986 assessment date. The salient point is that Mr. Libutti [sic] owned a one-half interest in Groovy from February, 1986 through November, 1986. LiButti's ownership of Groovy was also concealed by placing co-defendant Theodore Kruckel's name on the horse's foal certificate, with the result that when Groovy ran in the Kentucky Derby in 1986, Kruckel and not LiButti was listed as the owner.

The Government pressed at trial that despite the fact that Mr. LiButti was a part owner of this valuable thoroughbred during most of 1986, including that portion of

1986 after Mr. LiButti had been assessed, any public indicia of ownership was concealed from the IRS. The evidence on this point centered upon the fact that the foal certificate, which is the document presented to the racing authorities when an owner seeks to enter a horse in a race, did not list Mr. LiButti's name. In lieu of Mr. LiButti, the foal certificate listed Mr. Kruckel as co-owner of the horse along with John Ballis during the relevant period of time; it is the government's position that Mr. Kruckel acted as a nominee for LiButti. Thus, Groovy was held out to the world as a horse owned by Kruckel and Ballis.

Defendant attacks the charge on two grounds. First, he argues that the proof presented to the jury fails to satisfy the affirmative act of evasion element of the crime charged because there was no concealment. In support of this argument, defendant points to evidence adduced through his former accountant, Alan Grossberg, at trial. Mr. Grossberg testified that contemporaneous business records of the defendant and his daughter utilized by him to prepare the LiButti's tax returns fully reflected each of the Groovy transactions. He further testified that the capital gains realized by the defendant were duly reported on those tax returns, a fact confirmed by Agent-Grant.[8] Thus, the conclusion defendant urges is that there

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[8] The Government reminds us that by the time LiButti's 1986 tax return was filed, the horse had already been sold and thus was no longer available to the IRS to satisfy a portion of defendant's tax liability for the 1970 and 1971 tax year assessments that were finalized in 1986.

was no concealment because the government was free to subpoena Mr. Grossberg's work papers, from which ownership could have been gleaned.

It is true that unless a taxpayer is in a situation of giving voluntary admissions during an investigation or a forced response to a subpoena, it is not an act of concealment for the taxpayer merely to fail to inform the IRS of the existence of an asset; rather, the Government must prove a specific act designed to mislead or conceal. *See McGill*, 964 F.2d at 233. Thus, defendant is correct that it was not an act of concealment for him to fail to volunteer information about Groovy to the IRS.

Nonetheless, the jury could have properly found a requisite act of misleading or concealment here, because there was a document which served the purpose of announcing to the world the owner of the racehorse and that document falsely listed the name of someone other than the actual owner of the horse. By falsely listing Mr. Kruckel on the foal certificate as the co-owner of Groovy, defendant LiButti did not merely fail to affirmatively inform the IRS of his ownership interest in the asset, but beyond that, the jury could well have concluded that defendant LiButti affirmatively misrepresented the ownership of the million-dollar asset to the outside world, which includes the IRS. That the true nature of LiButti's ownership interest was contained in private workpapers scarcely undermines the fact that LiButti told no one of his investment in this valuable asset until after the asset was sold. In addition, the fact that the income generated from the sale of Groovy was reported on defendant's tax returns and the fact that defendant's own business

records, which could have been subjected to an IRS subpoena, reflected the Groovy transactions does not insulate those transactions from the evasion of payment charge. Defendant was free to argue, and did argue, to the jury that those facts, combined with the notion that a foal certificate is only utilized when a horse races and is ordinarily only of interest to racing authorities, do not support a finding of willful concealment, but the defendant is incorrect to submit in his post-trial motion that those facts compel such a conclusion. That LiButti was concealing his ownership from the racing authorities does not negate that he was also concealing it from the IRS.

The second argument defendant propounds with regard to Groovy relates to the third essential element of the charge – wilfulness. It is defendant's position that the Government has expressly conceded that in listing Mr. Kruckel on the foal certificate, Mr. LiButti did not intend to deceive the IRS but rather "only" intended to deceive the racing authorities. The basis for this argument is that the Government sought to adduce evidence at trial, and in fact introduced a stipulation at trial, that defendant LiButti could not obtain a license to race horses in New York or New Jersey during the relevant time period, and that Edith LiButti did not have any such racing licenses; the Government, in its opposition brief, states:

> So Robert and Edith LiButti couldn't put their names on the foal certificate for races in New York and New Jersey; they could not race the horse.
>
> For this reason, Ted Kruckel acted as a nominee owner of Groovy at LiButti's direction.

G'vt. Br. at 14. If the only intent of Mr. LiButti in withholding his name from the foal certificate was to race the horse by deceiving the racing authorities, the argument goes, then there was no intent to wilfully evade payment of income tax by virtue of that act, and thus the charge as to the Groovy act must fall.

Although it is true that the Government pressed the notion that the horse was listed in Mr. Kruckel's name at least in part because Mr. LiButti was unable to race the horse in his own name, it is not true that the Government contended that this was the *sole* motivation for that action. It was entirely permissible for the Government to argue that the act served the *dual* purpose of allowing the horse to race *and* concealing LiButti's valuable asset from the IRS. This is a conclusion amply supported by the proof. Moreover, the court will decline defendant's invitation to read the section of the Government's brief quoted above as a "dispositive concession," because although it may have been inartful for the Government to state that "for this reason [the inability of LiButti to obtain a racing license]," the horse was listed in Mr. Kruckel's name, the brief does not indicate that the inability of LiButti to obtain a racing license was the "sole" or "only" reason for the Groovy act. Thus, the brief may be read as consistent with the evidence and arguments presented at trial. Human motivation is a complex matter, and defendant's argument that where an individual is shown to have had one fraudulent motivation behind a certain act, he necessarily could not have had another, distinct motivation for that same act cannot withstand scrutiny.

LiButti argues that the origin of his concealment of ownership of Groovy predated the July 1986 final assessment, so that the jury could not have found that he had the intent to evade payment of the taxes. The evidence at trial was to the contrary. The genesis of the Groovy scam in February, 1986, came about a year or two after LiButti had announced to an IRS attorney, during the trial of the Tax Count case that led to the 1986 assessments for the 1970 and 1971 taxes due, that the IRS should accept a very small settlement offer because the IRS wouldn't be able to reach LiButti's assets if it won the Tax Court trial. Specifically, Matthew Magnone, District Counsel for the IRS in New Jersey, testified that LiButti told him in 1984, toward the end of the Tax Court trial, that the IRS should accept a nominal settlement offer ($50,000 on $1 million in contested liabilities at that time), with LiButti adding, "Because even if the government wins, you're not going to collect a penny," and he'd "make sure we were going to come up empty."

The evidence at trial showed that defendant LiButti made millions of dollars of income from his activities as a thoroughbred race horse broker and consultant. His IRS tax assessment became final on July 11, 1986 and the IRS became free to initiate collection activity. At this time and into early 1987, defendant owned a million dollar asset in the Kentucky Derby horse Groovy, yet there was no public record of his ownership because the foal certificate for this horse listed Theodore Kruckel and later John Ballis. This series of transactions orchestrated by defendant LiButti continued unabated after the 1986 assessment so that an IRS levy upon the asset became impossible.

For these reasons, the court rejects defendant's argument that the proof adduced concerning the Groovy act satisfies neither the affirmative act nor the wilfulness elements of the offense charged. The Government presented sufficient evidence to permit a jury's finding beyond a reasonable doubt that the act of listing on the foal certificate the name of Theodore Kruckel to conceal LiButti's interest in the million-dollar racehorse through January, 1987, was a wilful act of tax evasion in violation of 26 U.S.C. § 7201.

3. 183 West Saddle River Road act

Finally, I examine the evidence supporting the 183 West Saddle River Road act set forth in the Bill of Particulars. The Bill charged that this asset was a luxurious house placed in the name of defendant LiButti's wife, Joan LiButti, as nominee owner, in order to conceal defendant's actual ownership interest in the home from the IRS. As became apparent as early as defendant's opening statement, this charge was inherently weak, because the tax liability which had been assessed against the defendant at the time he resided in the home was assessed jointly against his wife, Joan LiButti, and thus the IRS was free to place a lien on the home regardless of whether it was carried in the name of Mr. LiButti or Mrs. LiButti. Indeed, the record establishes that it was Edith LiButti – against whose assets the IRS could *not* satisfy defendant's tax deficiency – who sold the house to Joan LiButti – against whose assets the IRS *could* satisfy that deficiency. Thus, defendant argued from the beginning that the effect of titling the home in Joan LiButti's name (which

occurred some 18 months before the 1986 IRS assessment) was to expose the house to, not to conceal it from, the IRS, collection capacity, and that if Mr. LiButti truly desired to conceal the house from the IRS, he would have left it in Edith's name.

The Government's response is three-fold. First, the Government points to proof that defendant LiButti "successfully stripped the house of value by arranging and obtaining a series of mortgages from Urban National Bank [UNB] of Franklin Lakes, New Jersey," which mortgages "effectively limited the equity in the house and made it an unattractive asset to the IRS." G'vt. Br. at 5. Second, the Government highlights evidence to the effect that after defendant lost his appeal from the July, 1986 tax assessment, ownership of the home at 183 West Saddle River Road was transferred to UNB via a deed in lieu of foreclosure, the terms of which permitted defendant and his wife to continue to reside in the home for another year upon payment of $500 per month rent. Third, the Government argues that evidence was adduced which proved that defendant LiButti structured his wife's bankruptcy filing so as to prevent the conveyance to UNB from being set aside. *Id.*

As to the first response, defendant argues that simply "frustrating" collection efforts by not carrying equity in a home is not an act of evasion as a matter of law. Section 7201 requires the Government to "prove a specific act to mislead or conceal" from the IRS. *McGill*, 964 F.2d at 233. It is not a felony under that section to simply frustrate the IRS. As to the second response (the agreement to transfer the home to UNB in lieu of foreclosure), defendant emphasizes that, in addition to bearing no relation to the

act as charged, the transaction terminated, rather than concealed, any interest in the house which the Government deems him to have owned.

More fundamentally, the defendant urges that each of the Government's responses varies materially from the act described in the Bill of Particulars, which alleged only nominee ownership of the house by Joan LiButti. " 'the purpose of a bill of particulars is to inform the defendant of the nature of the charges brought against him to adequately prepare his defense, to avoid surprise during the trial and to protect him against a second prosecution for an inadequately defined offense.' " *United States v. Addonizio*, 451 F.2d 49, 63-64 (3d Cir. 1971), *cert. denied*, 405 U.S. 936 (1972) (quoting *United States v. Tucker*, 262 F.Supp. 305, 308 (S.D.N.Y. 1966)). A bill of particulars, unlike discovery, functions to define and limit the Government's case: "As with the indictment, there can be no variance between the notice given in a bill of particulars and the evidence at trial." *United States v. Smith*, 776 F.2d 1104, 1111 (3d Cir. 1985). Thus, absent an order granting an application to revise the Bill of Particulars, the Government is limited to the notice given in the bill of particulars in obtaining a conviction on the Count to which it relates, specifically Count 1 here.

The court is inclined to agree with defendant that the theories which the Government describes cannot sustain a finding that § 7201 was violated by virtue of the 183 West Saddle River Road act because they vary impermissibly from the act as charged in the Bill of Particulars. To permit a conviction on that basis might well be

unfairly prejudicial to the defendant, because the Government gave specific notice was that only the fact of ownership of the home by Joan LiButti as nominee for defendant was to be the subject of proof at trial; the other theories emerged late in the trial.

The question remaining is whether the conviction on Count 1 is impaired here, where the court has reached the conclusion that three of the charged acts of evasion were amply supported by proof at trial but one act – the nominee ownership of 183 West Saddle River Road – may not have been adequately supported by proof at trial due to variance from the Bill of Particulars. Ordinarily, a charge of tax evasion could be supported by proof of any one affirmative act of evasion performed with the requisite intent. *See McGill*, 964 F.2d at 229; *cf. Griffin v. United States*, ___ U.S. ___, 112 S.Ct. 466, 473 (1991) (general guilty verdict in multiple-object conspiracy need not be set aside if evidence is inadequate to support conviction as to one object). It is the defendant's position, however, that proof of a single act of evasion would not necessarily support a conviction on Count 1 under the circumstances of the instant case, in light of the "continuous course of conduct" charging language and the language in the indictment referencing acts of evasion "[f]rom in or about July 1986 and up to and including the date of this Indictment." Defendant asserted at oral argument that if the time span of the evasive conduct proved was significantly shorter than that charged, prejudice to the defendant would ensue. Such an "overcharge" would be unacceptable, in the defendant's view.

Applying those principles to the situation presented and even assuming for present purposes the legitimacy of

defendant's concerns[9], defendant acknowledges that it is not necessary for each of the four acts charged to be sustainable so long as the acts which are sufficiently proved to support a conviction are shown to have taken place continuously over substantially the time period charged. Defendant specifically concedes that the charged course of conduct would be adequately proven by evidence sufficient to sustain the 2 Pell Farm Road act and either the Groovy act or the 183 West Saddle River Road act. Reply Br. at 11. Because the court finds that the 2 Pell Farm Road act, which continued from on or about June 15, 1988 through approximately March, 1993, and the Groovy act, which began prior to October, 1985 and continued through approximately January 5, 1987, and the Rolls Royce/$150,000 cash conversion act of June 13, 1988, are adequately supported by the evidence, the concerns defendant raises about a possible deviation from

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[9] These concerns could best have been alleviated through the use of the special jury verdict form the court suggested utilizing in the present case. Originally, the court adopted defendant's own suggestion that a special verdict form be used to require the jury to make a finding on each of the four affirmative acts of evasion. The verdict form proposed listed the four affirmative acts of evasion charged in the Bill of Particulars and required the jury, if it found defendant guilty under Count 1, to proceed to indicate which of the acts were unanimously agreed upon to support that conviction. Moments before the court delivered its instructions to the jury, defense counsel changed his mind and demanded that no special interrogatories be used on Count 1. The court perceived that it did not have the discretion to require the submission of the special verdict form to the jury over an objection by the defendant, and thus when defendant decided in the end not to agree to distribution of the form, the court acceded to defendant's position.

the charging language are alleviated. These three schemes constitute an enormous and continuing series of acts of evasion more than ample to support the charge in Count 1. Even on defendant's own terms, then, the fact that the 183 West Saddle River Road act may not constitute an unlawful affirmative act of evasion does not impair the verdict, as each of the other acts is sufficiently sustainable. Accordingly, the defendant is not entitled to a verdict of acquittal on Count 1.

B. Counts One, Two and Three – Wilfulness

Counts 2 and 3 charge defendant with the misdemeanor of wilfully failing to pay taxes in violation of 26 U.S.C. § 7203, with respect to the tax years 1987 and 1988. Wilfulness is, similarly, a required element of Count 1, felony tax evasion. *See McGill*, 964 F.2d at 229. Defendant argues that he is entitled to a verdict of acquittal on each of the tax counts because there is insufficient evidence to sustain a finding that his failure to pay taxes due and owing was willful. It is defendant's position that because certain witnesses – James Roberts, George Najemian, Bernard Wishnea, and Larry McClure – testified that Mr. LiButti told them during the relevant time period that he wanted to pay his tax deficiencies but needed to gamble to win the money to do so, and because this evidence was allegedly "unrebutted" by Government witnesses, the court must acquit defendant on the charges.

This argument does not merit substantial discussion. The Government introduced the substantial testimony of certain witnesses, including Matthew Magnone,[10] Dolores Berger,[11] Mark

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[10] Mr. Magnone testified that when he was an Assistant District Counsel for the Internal Revenue Service during the lengthy Tax Court trial concerning the IRS's determination of defendant's 1970 and 1971 income tax liabilities in 1984, with about $1 million in dispute, he spoke several times with Mr. LiButti about settling the case. At the most, according to Magnone, LiButti asked if the IRS would resolve the case for a compromise payment of $50,000, which Magnone rejected. According to Magnone, LiButti said, "You ought to take the $50,000, because even if the Government wins, you're not going to collect a penny." Magnone testified LiButti further stated words to the effect that he'd make sure the IRS "was going to come up empty" even if the Tax Court upheld the IRS's position. Shortly thereafter, the Tax Court entered a verdict assessing taxes of $672,000 and a fraud penalty of $330,000 which was upheld on appeal to the Third Circuit in 1986. Magnone testified that he took LiButti's threats of concealing assets seriously due to what LiButti actually said, and his prior pattern of conduct toward the IRS, in which the IRS proved to the Tax Court's satisfaction that he had engaged in activities to use nominees to conceal assets in the 1970-71 tax years at issue. He testified that he regarded LiButti's statements as a basis for a criminal referral that he later made to the appropriate authorities within the IRS.

[11] Delores Berger was an employee of Urban National Bank for 21 years who was an Assistant Branch Manager and a personal friend of Robert and Joan LiButti. Among other things, Ms. Berger testified that Robert LiButti received a series of new car loans, numbering 25 or 30, during the period 1984-1986, as he repeatedly bought new cars and financed them at 100 percent of the purchase price. When she asked Robert LiButti why he bought so many cars and took out so many loans, he said in effect that he had a case pending with the IRS "so if the IRS ever came to pick up the car, there would be no collateral in the car."

Levine,[12] and Gary Selesner,[13] who related instances in which the defendant made admissions on the subject

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She testified that he wanted to have no equity in his new cars. Obviously the defendant's stated purpose was to avoid owning a substantial interest in the luxury automobiles that he continually purchased.

[12] Mark Levine testified that he was a general partner in the construction of a new 7,000 square foot home on 1 1/2 acres at Mendham, New Jersey, with an asking price in 1990 of $1.3 or 1.4 million. With the house still unsold, he received a call from a real estate agent in early 1993 who introduced Mr. LiButti and his wife Joan as the couple who would lease, reside in and purchase this home. Defendant LiButti did all the negotiating and said that the lease and contract of sale would have to be put solely into his wife's name. According to Mr. Levine, defendant LiButti said he was involved in a longtime dispute with the IRS and that for the sake of convenience and necessity it would be more appropriate if Joan were the sole party to the lease and agreement of sale. (Although the jury was instructed that the Mendham home was not charged as an affirmative act of evasion, the jury was permitted to consider this testimony to give context to the statement of LiButti to Levine.) This arrangement – with Joan as the sole listed tenant and purchaser – was consummated in April 1993. The jury could well conclude that defendant LiButti continued to be conscious of avoiding property ownership because of his obligations to the IRS.

[13] Gary Selesner testified that he was Director of Advertising, Public Relations and Marketing for the Trump Plaza Hotel and Casino from 1984 and became President of Trump Plaza in 1990. He testified Mr. LiButti had been a very important gambling patron who stopped gambling in 1989. In 1990, LiButti had lunch with Selesner, and since the casino was still giving large comps to LiButti, Selesner wanted to discuss whether he'd be returning the playing. Selesner testified that LiButti said he "had a problem with IRS, and once the problem was resolved he'd return." The jury could well conclude that LiButti was refraining from gambling because of his consciousness that IRS could seize his gambling funds on

arranging his assets to avoid tax payments. The jury was free to reject the testimony of the defense witnesses as biased and implausible. This is so in part because the defendant came into large sums of cash during the relevant time frame, yet failed to tender any payments to the IRS for the 1970, 1971, 1987 and 1988 liabilities. As the Government points out in its brief, the evidence showed that defendant earned approximately $3,000,000 from the sale of inventory in 1987 and 1988; that defendant earned some $960,000 in 1988; that during 1987 and 1988, defendant received complimentary gifts from Trump Plaza Hotel and Casino worth more than $1,300,000; and that from 1986 through 1989, defendant gambled with and lost approximately $11 million gambling at Atlantic City casinos. Thus, even apart from the admissions of defendant, the jury could have inferred from such ability-to-pay evidence that any failure to pay was the result of willfulness on the part of defendant. Accordingly, the state of mind evidence introduced by defendant on his own behalf was not, in fact, unrebutted, notwithstanding defendant's attempts to explain his failure to make partial payments when he came into substantial sums of money.[14] The jury apparently rejected the testimony

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deposit with the casino cage if he resumed high-stakes gambling.

[14] As will be discussed further in Part IV, below, defendant contended at trial that (1) although he came into large sums of money, the Government failed to show that his assets at any given point in time were sufficient to cover the whole of his outstanding tax liabilities; (2) he was informed by his attorney, Bernard Wishnia, Esquire, that negotiations with the IRS which he undertook in an attempt to compromise those liabilities by offering payment in an amount less than the full assessed

offered by the defense concerning defendant's professed desire to pay his taxes in full, and it was perfectly free to do so. At a time when he was self-employed as one of the nation's most successful thoroughbred horse brokers and consultants, earning millions of dollars, living in luxury homes and driving or being chauffeured in his luxury automobiles, the evidence strongly demonstrated that he intended to spend his money on his own lifestyle rather than in payment of income taxes. The verdict on Counts 1, 2 and 3 will not be disturbed.

II. Defendant's Argument That The Evidence On Counts 4 and 5 Is Insufficient To Sustain the Bank Fraud Convictions

Under 18 U.S.C. § 1344(a), it is an offense to execute a scheme or artifice to defraud a federally chartered or insured financial institution or to obtain money from it

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liabilities had failed; and (3) defendant's understanding that he was therefore to tender full payment to the IRS played into his compulsive gambling disorder, one characteristic of which is to make payments of debts in full and another characteristic of which is to chase the "big win" which will solve all of one's problems, such that he intended to pay off the IRS with money won at the casinos but only if and when the big win was realized and the debt could be paid all at once and in full. While the court permitted defendant to introduce evidence in support of this defense to attempt to defeat a finding of wilfulness with regard to his admitted failure to pay taxes, the defendant is incorrect to assert that the jury was bound to accept this extraordinary explanation of defendant's actions at face value, especially in light of conflicting expert and fact testimony on certain critical points.

"by means of false or fraudulent pretenses, representations, or promises." In support of this charge, the Government produced the immunized testimony of James Roberts, an unindicted alleged co-conspirator in the bank fraud with which Mr. LiButti and Mr. Kruckel (the President of Urban National Bank) were charged. Mr. Roberts was a long-time friend of defendant LiButti who admitted at trial that at least during much of the time period relevant to the indictment, he usually spoke to Mr. LiButti on a daily basis. He further acknowledged that he and Mr. LiButti were as close as friends could be. He offered a first-hand account of the events at issue in Counts 4 and 5. It is essentially defendant's position that because Mr. Roberts testified not only to the facts surrounding the loan charged to have been fraudulent but also as to the intent of that loan, which he asserted was to help rather than injure UNB, the Government failed to meet its burden to show that defendant acted with the requisite intent to defraud the financial institution.[15]

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[15] Intent to defraud the financial institution is a necessary element of the substantive offense charged in Count 5, and upon which the conspiracy alleged in Count 4 was based. The bank fraud statute provides:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice to defraud a financial institution or to obtain any of the moneys, funds, assets . . .or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises; . . . shall be guilty of an offense against the United States.

18 U.S.C. § 1344. *See United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992).

Some background is in order. The testimony of James Roberts indicated that Roberts was an unemployed car salesman from April – December, 1986, having been formerly employed as a sales manager for a Mercedes dealership in Southampton, Long Island, New York. On September 15, 1986, LiButti asked Roberts to meet him at UNB. According to Roberts' testimony, Roberts understood that LiButti wanted him to sign a loan for $1.25 million in Roberts, name so that Mr. Kruckel, the President of UNB, could give the proceeds to LiButti to cover some of LiButti's overdrafts at the bank, because Kruckel wanted to conceal his problem in having overextended credit to LiButti and because LiButti could not get additional loans from UNB in his own name.

Roberts testified that he met LiButti at Kruckel's bank office on September 15th, and that Kruckel prepared and furnished Roberts with a promissory note listing Roberts as the borrower and "Groovy" as the collateral for a commercial loan of $1.25 million, although the evidence is uncontradicted that Roberts never owned Groovy and that both Mr. Kruckel and Mr. LiButti were in good positions to know that. Tr. 1/26/94 at 36:19-37:8. Mr. Roberts signed the note as well as two cashier's checks made payable to him, one for $750,000 and one for $500,000, endorsing the checks on the back. Tr. 1/27/94 at 11:6-11. Most importantly, Roberts testified that he lacked the funds to repay the loan issued in his name, but that he did not expect that he was required to make payments on it because it would be taken care of by someone else. Tr. 1/27/94 at 10:21-11:1. As his testimony confirmed, an interest payment on the loan was indeed made by Mr.

LiButti in December, 1986, and the loan was renewed for its full principal value. Tr. 1/27/94 at 25:24-26:2.

While the initial loan documents indicated that the loan was secured by Groovy, at some point in the future, Mr. Roberts testified, he received a renewal note from Mr. Kruckel making no reference to Groovy and making no reference to any substituted collateral, and Mr. Roberts was asked to sign that note. Roberts stated that, upon receiving this document, he spoke to Mr. LiButti about some concerns, but that LiButti assured him that he needn't worry about the fact that the loan was no longer collateralized. Tr. 1/27/94 at 36:7-12, 16-22. The loan has never been repaid.

In addition to these central facts, Mr. Roberts offered testimony regarding the purpose of the loan extended in his name. He stated that it was his understanding that the purpose of the loan was to satisfy concerns of bank examiners auditing UNB, who had encountered violations of the lending limits by virtue of the number of outstanding loans issued to Mr. LiButti.

However, the Government introduced evidence that the loan proceeds did not flow back into the bank in their entirety solely to eliminate the LiButti lending limit violations by UNB. FBI Financial Manager Joseph Lattore testified to a Government chart (Ex. G-160) summarizing the Roberts loan. Mr. Lattore explained that all of the $1.25 million dollars in loan proceeds was deposited into defendant LiButti's Buck Chance Stable account on September 15, 1986. (Ex. G-136) Based upon documents reviewed by Mr. Lattore, he testified that there was then a series of debits from the account. $600,000 was deposited

into Edith LiButti's Lion Crest Stable account (Exs. G-149 & 150).[16] Two cashier's checks, for $50,000 and $100,000 (Exs. G-141 & 144) were drawn to Trump Plaza Associates for Mr. LiButti on September 15th. A Buck Chance Stable account check for $110,000 (G-143) on September 15th was converted by defendant to cash, divided into a $100,000 cashier's check to Trump Plaza, $9,000 in cash to defendant, and $1,000 redeposited into the same account. (Ex. G-145.) He also paid his chauffeur, Rollo Roach, with a Buck Chance Stable check from these same proceeds that same day (Ex. G-138). Some of the proceeds were handed over to First National Bank of Fort Lee (Exs. G-146 & 147), and $5,000 was paid to Joan LiButti (Ex. G-140), and defendant drew $4,270.96 for his monthly car loan payment on a Rolls Royce. (Ex. G-139). In all, only some $750,000 dollars actually flowed back to the bank, according to Mr. Lattore, Tr. 1/19/94 at 206:3-5, and $500,000 was expended for defendant's presumed personal use on that same date.

This evidence directly contradicts the contention pressed by defendant here that there was no evidence to rebut the testimony of James Roberts that the loan was solely intended to assist UNB by deceiving bank examiners by making it look like LiButti was reducing his debts; a substantial portion of the proceeds were not in fact used to funnel money back into UNB but rather

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[16] Of the $600,000 that LiButti moved on September 15, 1986 from his Buck Chance Stable account to the Lion Crest Stable account, $500,000 was used to reduce Lion Crest's indebtedness to UNB (#Ex. G-153), and $100,000 was not so used.

inhered to defendant's direct benefit. Moreover, even to the extent that other parts of the Roberts loan proceeds were used to reduce the indebtedness of Robert and Edith LiButti to UNB, the bank still suffered a loss of funds due to the substitution of valueless consideration (Roberts' promise, as an unemployed person to repay the $1.25 million debt in 90 days) reducing the bank's loans to persons of substantial income and ability to repay. Thus, in round numbers, $500,000 left the bank within the first day, and the other $750,000 diminished the bank's claims upon Robert LiButti and his daughter in exchange for James Roberts' worthless signature.

Defendant propounds an additional argument, as he did at trial, to support his contention that the Government failed to prove he acted with the requisite intent to defraud UNB. The argument is essentially that because Mr. Kruckel was the President of UNB as well as a major stockholder and the son-in-law of the Chairman of UNB's Board of Directors and held himself out to be "the bank," and because Mr. Kruckel was fully involved in the loan transaction and personally approved it, it was impossible for defendant LiButti to have acted with intent to injure the bank. As the defendant acknowledges, however, it is not necessarily a defense to bank fraud that a bank officer was personally involved in the events alleged to have been fraudulent, *United States v. Saks*, 964 F.2d 1514 (5th Cir. 1992), if the defendant acted with intent to defraud the bank. *Id.*

Again, Mr. Roberts' assertion that he didn't believe he was doing anything wrong vis-a-vis the bank because he acted at the behest of Mr. Kruckel is not dispositive on the question of whether Mr. LiButti in fact intended to

defraud UNB. Neither is the defendant's reference, during closing argument, to the alleged intention of defendant to deceive bank examiners (rather than the bank itself) dispositive of this point. The Government correctly acknowledged that the loan may have served Kruckel's purpose of deceiving the bank examiners, but that is not to say that the defendant's purpose of the loan was to deceive the bank examiners, as urged by defendant. The Government was correct to perceive that the loan might have been motivated, at least in part, by a desire to partially "cure" multi-million dollar lending limit violations which were the subject of scrutiny by bank examiners. Nonetheless, the Government produced ample evidence that the loan was also designed to defraud the financial institution, at a minimum insofar as part of the money, lent in the name of one other than the true recipient of the proceeds, did not flow back into the bank but rather was disbursed for various personal purposes, including gambling, by the defendant and was never repaid. The evidence does not compel the conclusion that the defendant acted without the intent to defraud UNB; to the contrary, the jury's finding that the defendant acted with such intent is well-supported by the evidence and will not be set aside.

Finally, the defendant advances an argument, without legal support, to the effect that because there was no evidence of any reliance of the bank upon any material misstatements by defendant with regard to the Roberts loan, the conviction on Counts 4 and 5 cannot stand. The charge to the jury correctly failed to include such a requirement, because the statute does not require reliance on material misrepresentations. *See, e.g., United States v.*

Goldblatt, 813 F.2d 619, 624 (3d Cir. 1987). The jury was correctly instructed regarding the elements of bank fraud as set forth in *Goldblatt* and *United States v. Schwartz*, 899 F.2d 243 (3d Cir. 1990). *See* Jury Charge at 77-80. There is simply no basis upon which to attack the charge.

III. Defendant's Argument That He Is Entitled to a New Trial Because the Convictions Are Against the Weight of the Evidence to a Degree That Renders Them a Manifest Injustice

Rule 33, Fed.R.Crim.P., empowers a court to order a new trial "if required in the interest in justice." Review under Rule 33 permits the court to enter into issues of credibility of witnesses, as distinguished from the standard applicable to a motion brought pursuant to Rule 29(c), Fed.R.Crim.P. The rule may be applied where the trial court does not believe that the evidence supports the jury's verdict. *United States v. Dixon*, 658 F.2d 181 (3d Cir. 1981).

Suffice it to say, in light of the lengthy discussion in Parts I and II above, that the court rejects defendant's position that there was a miscarriage of justice upon the rendering of a guilty verdict on Counts 1 through 5. To the contrary, it is the opinion of this court that the weight of the credible evidence pointed to defendant's guilt and supported the jury's decision to convict on each of the counts. The verdict will not be disturbed.

IV. Defendant's Argument That The Court Erroneously Precluded Various Aspects of Expert Testimony Concerning His Compulsive Gambling Disorder

Prior to opening statements, defendant LiButti made an application to the court to admit the testimony of two proposed expert witnesses concerning his alleged compulsive gambling disorder, under the theory that his disorder deprived him of the intent to violate the tax laws as charged in Counts 1, 2 and 3. The court convened a lengthy Rule 104(a) hearing and, after hearing testimony from the proposed defense expert witnesses and the proposed Government expert witness, the court issued an Opinion on February 8, 1994 pursuant to Rules 702 and 403, Fed.R.Evid., granting in part and denying in part the defendant's application in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, ___ U.S. ___, 113 S.Ct. 2786 (1993), and *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985).[17]

To summarize, the court permitted the introduction of evidence through defendant's psychiatric expert, Robert T. Latimer, M.D., regarding the diagnosis of Mr. LiButti as an individual with a mental condition of compulsive or pathological gambling disorder. In addition, Dr. Latimer was permitted to testify as to the " 'full

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[17] The careful procedures followed by the court in applying the *Daubert/Downing* tests were also fully consistent with the recent decision of the Third Circuit in *In Re: Paoli Railroad Yard PCB Litigation*, No. 92-1995, ___ F.2d ___ (3d Cir. Aug. 31, 1994), slip op. at 39-55.

payment' issue, namely, to render his opinion that defendant LiButti, as a pathological gambler, had the characteristic of a defective thought process whereby he believes he must take the funds that he possesses (which could be used to make a partial payment of a debt) and gamble the funds to seek to gain money for a full lump sum payment of the debt, allegedly intending all the while to repay the underlying debt with the gain." Order dated 2/7/94. The court precluded Dr. Latimer from testifying about the alleged pathological gambling lifestyle and the compulsive gambler's decision-making process in deciding to pay debts other than taxes. *Id.* The so-called "pathological gambling lifestyle" theory seeks to excuse the defendant's decisions to acquire and surround himself with the trappings of an opulent lifestyle – huge homes, customized furnishings, antiques, Mercedes Benzes, Rolls Royces, fine wines, etc. – rather than paying his taxes because those luxuries permit him to impress his business clients so that he can continue to earn millions of dollars to ultimately serve his pathological desire to gamble. In precluding this testimony, as well as the alleged pathological gambler's heirachy [sic] of paying debts other than taxes, the court determined that these characteristics "speak only to the issue of inappropriate behavior, and not the negation of criminal intent," which is the only proper purpose for the psychological expert testimony. *See United States v. Pohlot*, 827 F.2d 889, 903-06 (3d Cir. 1987), *cert. denied*, 484 U.S. 1011 (1988). The court found that nothing in the research cited by defendant's proposed experts indicates that the pathological gambler who fails to pay taxes lacks the specific intent to violate

the tax laws due to a mental disease or defect, Opinion 2/8/94 at 21.

In addition, the defense was precluded from introducing the testimony of Mr. Arnold Wexler regarding Mr. Wexler's diagnosis of the defendant as a compulsive gambler, because the proposed testimony was redundant and unduly consumptive of time on an issue not in dispute, and thus was precluded under Rule 403's balancing test as the Government's expert agreed with the diagnosis. Mr. Wexler's proffered testimony on the "full payment" issue was found to be unreliable, anecdotal and unhelpful and was accordingly excluded for lack of a reliable scientific or medical basis under Rule 702 and *Daubert, supra.* Overall, Mr. Wexler was uninformed on the concept of negation of criminal intent, and he was found to have "demonstrated the tendency to confuse rather than elucidate these issues," Opinion 2/8/94 at 18.

The court will not revisit its decision to exclude a portion of defendant's proffered expert testimony herein, because the subject was previously treated with care in the court's Opinion of February 8, 1994. In fact, the court's determination to permit psychiatric testimony regarding compulsive gambling disorder as it relates to the alleged negation of intent to evade payment of taxes appears to be without precedent in reported federal cases, as courts have typically rejected such testimony altogether on this issue. However, defendant LiButti does raise an additional issue, which will be addressed at this time, concerning whether the ruling summarized above should have been revised in light of certain events at trial.

First, defendant points to the Government's cross-examination of Dr. Latimer, in which a question was posed about why Mr. LiButti made partial payments of debts other than his tax deficiencies. Defendant contends that it was unduly prejudicial for Dr. Latimer not to have been permitted to respond to that question by stating his opinion that compulsive gamblers tend to prioritize their debts in a manner consistent with their disorder. As the Government points out, at the time of Dr. Latimer's testimony there was no objection to the line of questioning now cited, which was immediately cut off by the court almost as soon as it began. Moreover, the question at issue was withdrawn after a discussion at sidebar. Tr. 2/10/94 at 140:19-147:5. In any event, the matter does not rise to the level of being so unfair as to require a new trial. At most, the jury heard a question posed on cross-examination which was withdrawn before any answer was called for.

Second, defendant complains about the fact that Dr. Greenfield, the Government's expert witness, allegedly injected the compulsive gambling lifestyle issue into the case when he opined on cross-examination that Mr. LiButti's habits indicated that his compulsive gambling disorder was not as severe as that of some of his patients, and that it was error for the court not to permit defendant's experts from further pursuing the lifestyle issue. As the court found at the time, the cross-examination by defense counsel called for the responses to which defendant now objects and cites as requiring a new trial. Tr. 2/16/94 at 26:7-30:15. This court correctly declined to permit defense counsel's cross-examination of Dr. Greenfield to open the door to defendant's exploration of areas

of proffered testimony that had been properly limited in the court's prior rulings. In other words, a party may not launch an excursion into a prohibited zone on cross-examination to elicit responsive testimony that bootstraps the litigation into those issues.

In sum, the court rejects defendant's contention that there was prejudicial error in not permitting a portion of the proffered expert testimony regarding compulsive gambling disorder. Defendant's motion for a new trial on this ground will be denied.

V. Defendant's Argument That The Court Substantially Prejudiced Mr. LiButti's Defense By Admitting Certain Pre-Assessment Evidence Concerning the 183 West Saddle River Road Act And the Groovy Act

Defendant objects to the Government's introduction of certain preassessment evidence concerning 183 West Saddle River Road and preassessment evidence of cash deposits by defendant into the bank account of his wife, Joan LiButti. In addition, defendant contends that the Government should not have been permitted to introduce preassessment evidence of Groovy transactions.

First, the defendant's conduct with respect to both 183 West Saddle River Road and Groovy before the October 19, 1986 statute of limitations cutoff date was relevant and admissible for the purpose of proving a continuous course of conduct into the relevant period, as determined also in the pretrial ruling, Opinion filed August 15, 1993 at 36 n. 12. The challenged evidence easily satisfied this standard of relevance.

With respect to cash deposits by defendant into his wife Joan's account to pay the mortgage, Special Agent Grant testified that Mr. LiButti made $187,900 in cash deposits into Joan's UNB account between 1985 and 1987, which included a pattern of transactions supporting the Government's theory of defendant using his wife as his nominee owner of 183 W. Saddle River Road well into the post-October 19, 1986 period. The Government never charged nor argued that the cash transactions evidenced unreported income; instead, such transactions tended to demonstrate defendant's ownership interest in the home and his ability to have paid substantial sums of his taxes if he chose to do so.

Similarly, information about the defendant's complicated dealings concerning his hidden ownership interest in the racehorse Groovy was admitted for the entire period of his Groovy ownership, including the months before assessment, and extending thereafter into January, 1987. The bill of particulars charged that defendant LiButti hid his ownership interest in Groovy through a series of transactions between his company (Buck Chance Stable), John Ballis, and Lion Crest Stable, "a company nominally owned and operated by is [sic] daughter, Edith LiButti," Bill of Particulars, *supra*. That Lion Crest was only nominally owned by Edith was thus relevant to the contours of this alleged act of evasion. Defendant LiButti's dealings with his daughter Edith concerning Groovy were probative of his relationship, and a jury could probably not comprehend the Groovy series of post-assessment transactions if the evidence of pre-assessment conduct were excluded.

Finally, the defense argument fails to note that the court precluded the Government from offering evidence of numerous points in the trial that Lion Crest Stable was Mr. LiButti's nominee; for example, several Lion Crest tax returns were precluded from evidence because this court found that the Bill of Particulars did not charge that Robert LiButti used Lion Crest itself as his nominee. But at other points in the trial, such as with respect to the Groovy transaction and the disposition of significant proceeds from the fraudulent Roberts loan, evidence regarding Lion rest [sic] was relevant because of Lion Crest's relationship to a charged act of criminal conduct.

Where defendant LiButti enmeshed Lion Crest so deeply into his criminal conduct, reasonable evidentiary breadth had to be allowed to enable the jury to understand the Robert LiButti/Edith LiButti/Lion Crest relationship. The challenged evidence was well within the zone of reasonableness.

Defendant's motion for anew [sic] trial on these grounds is denied.

VI. Defendant's Argument That the Court Erred in Refusing to Instruct the Jury on Certain Legal Principles

The court is bound "to give the substance of a requested instruction relating to any defense theory for which there was a foundation in the evidence." *United States v. Blair*, 456 F.2d 514, 520 (3d Cir. 1972). However, there is no error in refusing to instruct the jury as counsel wishes if the charge to the jury is correct. *Id.* Defendant

contends that the court erred by refusing to deliver certain of its proposed instructions, and that the defense was substantially prejudiced as a result. I examine the proposed but rejected instructions in turn.

First, defendant points to his proposed instruction relating to the 183 West Saddle River Road act on the tax evasion count in which he requested that the jury be informed as a matter of law that

> the Internal Revenue Service can satisfy . . . joint tax deficiencies by claiming assets titled to or owned by either joint obligor and that an individual cannot and does not commit an act of evasion by titling an asset in the name of another individual who is jointly liable for the tax deficiency.

While this proposition might or might not be accurate as a matter of law, it was unnecessary for the court to so "instruct" the jury. The issue for the jury's consideration was whether the defense theory that the requisite intent to wilfully evade the payment of income taxes was proven as to each of the four charged acts of evasion, and the jury was instructed about the defense theory that

> defendant contends that he did not act wilfully in failing to pay his tax deficiencies, that is, he did not voluntarily, deliberately and intentionally violate his legal duty to pay taxes due and owing. I previously instructed you that the government must prove beyond a reasonable doubt that Mr. LiButti acted willfully in failing to pay his taxes after July 11, 1986 under Count One, after April 15, 1988 under Count Two, and after April 15, 1989 under Count Three.

Jury Instruction 37. Thus, the defense theory – that proof of wilfulness was lacking – was presented to the jury in the charge. In addition, the requested but rejected "instruction" was an argument which defense counsel was free to make, and did make, throughout the trial in support of his position regarding the lack of evidence of intent. It did not merit a special legal instruction.

The defendant also alleges error in the court's failure to instruct the jury as a matter of law that

> a foal certificate is not a title document and that the absence of Mr. LiButti's name on Groovy's foal certificate cannot, in and of itself, establish an intent to conceal his ownership interest in that horse from the Internal Revenue Service.

The court correctly refused to so instruct the jury, because this is not an accurate statement. It was the jury's province, upon hearing testimony concerning the meaning of foal certificates, to determine the significance of defendant LiButti's actions in not acknowledging ownership of Groovy on the foal certificate. The significance of the foal certificate was developed by the witnesses, and the jury was free to determine the weight of the customary use of the foal certificates in the racing industry.

Third, defendant alleges error arising out of the court's decision not to charge the jury as a matter of law that

> an individual cannot and does not commit an act of evasion by paying an obligation other than his tax deficiency and divesting himself of any title to an ownership of the funds used to pay that obligation.

Again, this is a matter which the defendant was free to, and did, argue to the jury. It was not necessary for a proper charge to be delivered that the jury receive an "instruction" to this effect. Rather, the court satisfied its obligation to the defendant to charge the jury on the defense theory on Count 1 when it delivered the following appropriate instruction requested by defendant:

> With respect to Count One, Mr. LiButti contends that he did not commit any of the four acts of evasion charged with the requisite intent to evade or defeat the payment of his tax deficiencies.

Jury Charge 36.

Finally, there was no error in the court's rejection of the proposed charge that

> should you find that Mr. Kruckel approved the Roberts loan as issued – the government must prove beyond a reasonable doubt . . . that Mr. Kruckel deceived, and that Mr. LiButti intended to deceive, other bank officers, directors or employees with respect to the Roberts loan.

The court was not bound to deliver such an instruction. This proposed charge appears to be a statement of defendant's view of the law as applied to the facts of the case rather than a theory of defense. The jury was correctly instructed as to the essential elements of the crime of bank fraud which the Government was required to prove beyond a reasonable doubt. *See* Jury Charge at 76-80. Beyond the fact that the law was properly set forth in the charge, the court delivered an instruction to the jury

concerning the defense theory regarding the bank fraud and conspiracy counts as requested by defendant:

> With respect to Counts 4 and 5, Mr. LiButti contends that he neither defrauded, nor conspired to defraud Urban National Bank with the specific intent to deceive the bank.

Jury Charge at 81. Defendant's contention is baseless and his motion for a new trial on this ground will be denied.

VII. Defendant's Argument That the Government's Rebuttal Unfairly Prejudiced His Defense

Defendant LiButti charges that the Government's rebuttal improperly injected three areas of uncharged allegations into the case, and that the Government wrongly urged the jury to convict on those grounds.

First, defendant complains that he was prejudiced when the Government argued that in 1988, defendant LiButti used the bank account of his daughter, Edith, as his own. Tr. 2/17/94 at 192:9-14. The Government did not charge defendant in the Bill of Particulars with using Edith LiButti as a nominee with regard to defendant's use of her business bank account, and thus defendant is correct to claim that it would be improper for the Government to argue the use of the bank accounts as a substantive charge. Indeed, when the court determined that the Government may have articulated such an argument in its initial closing, the court directed the Government to make clear to the jury that defendant LiButti was not charged with the misuse of his daughter's bank account. Tr. 2/17/94 at 56:19-24. Subsequently, the defense closing

raised the related issue of the nature of the loan transactions between the defendant and his daughter, arguing that there wasn't "one shred of evidence" that there was anything improper about the loans. Tr. 2/17/94 at 163:22-24.

It was in response to that argument that the Government addressed the loans and argued the following: (1) that defendant LiButti was fearful that the IRS would levy any bank account in his name and was thus motivated to abandon his own bank account and share an account with his daughter; (2) that the "loan account" reflected in the workpapers of defendant's accountant was a mechanism for keeping track of money belonging to each individual; and (3) that within the shared bank account it was Mr. LiButti's money that was used to pay for 2 Pell Farm Road. Tr. 2/17/94 at 191:2-193:15. The court ruled, upon defendant's objection, that the rebuttal argument appropriately responded to the argument made in defendant's closing. Tr. 2/17/94 at 193:16-194:7. The court continues to believe that its ruling was proper.

Second, defendant points to the argument made in the Government's rebuttal closing that the issue of whether the loans were shams was properly before the jury. Tr. 2/17/94 at 191:4-9. It is the defendant's position that because defendant was not charged with making sham loan transactions with Edith, such an argument is off limits. This argument misses the mark because although the jury was not to render a verdict on this precise point, the issue of whether the loans were shams is simply a restatement of a question very much before the jury: whether the house at 2 Pell Farm Road belonged to Edith LiButti only as a nominee for Robert LiButti

despite the fact that the down payment was made by way of checks issued from Edith LiButti's bank account. This issue implicated the question of whether money which flowed out of Edith's bank account to pay for the home was in fact her father's, and it was for the jury to determine the factual question of whether the down payment money was Mr. LiButti's (it had come into Edith's account as a consequence of deposits made by Mr. LiButti), or whether those deposits were merely repayments of loans and thus unrelated to the money which, shortly after the making of the deposits, flowed from Edith's bank account to pay for the house. Especially in light of the defense closing regarding the asserted lack of evidence of the sham nature of the loans at issue, it was perfectly proper for the Government to argue as it did in rebuttal.

Third, defendant argues that it was improper for the Government to argue in rebuttal that a November, 1986 loan from UNB to Edith LiButti supported the Government's theory on Counts 4 and 5. Tr. 2/17/94 at 188:17-189:6. In the defense closing, the jury was told that the bank could not have been defrauded because Mr. Kruckel and the Board were part of a scheme to defraud the bank examiners only. In support of this argument, the defense pointed to the fact that the Government failed to call any witnesses from UNB's Board of Directors to testify and argued, accordingly, that the Board knew the Roberts loan was part of a scheme to defraud the bank examiners and thus that the Board was not itself defrauded. Tr. 2/17/94 at 121:23-134:8. The Government, in rebuttal, argued that it was no defense to the charged bank fraud that Mr. Kruckel was part of a scheme to defraud the bank examiners, and specifically that in

November of 1986 Mr. Kruckel made a questionable loan to Edith LiButti, the proceeds of which permitted defendant to repay an outstanding $150,000 loan from UNB to defendant. Tr. 2/17/94 at 187:6-189:6. The court sustained defendant's objection to this line of rebuttal argument, and decided to give a curative instruction to the jury that it would not consider the bank's practice in connection with the November, 1986 loan to Edith LiButti. Tr. 2/17/94 at 212:24-214:14. In light of the curative instruction, the court rejects defendant's contention that he suffered substantial prejudice.[18]

In sum, the court denies defendant's motion for a new trial based upon the Government's rebuttal closing.

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[18] Moreover, the history of UNB loans to Edith LiButti's Lion Crest Stable in 1986 as highly relevant to the crimes charged in Counts 4 and 5, since defendant LiButti used $500,000 of the Roberts loan transaction on September 15, 1986, to reduce Lion Crest's indebtedness to the bank. Defendant had argued that defendant's reduction of Lion Crest's indebtedness essentially used this portion of the Roberts loan to keep the money "in the bank" and therefore negate bank fraud. To the extent that LiButti was using his deposit into Lion Crest's account to reduce his personal indebtedness to his daughter, as he argues here, he is merely reducing his personal obligations to his daughter who when uses a portion of the $600,000 deposit to make a payment toward *her* debt to UNB, not defendant's debt, if defendant's own logic is accepted. The very elastic nature of the triangle of loans and debts among Robert LiButti (Buck Chance Stable), Edith LiButti (Lion Crest Stable) and UNB at this point in time would have even rendered the November, 1986 loan quite relevant if the court had not excluded it from consideration.

VIII. Defendant's Argument That He Was Prejudiced When The Court Denied His Motion to Preclude the Government From Using Mr. LiButti's 1977 Conviction and Prior Use of An Alias For Impeachment Purposes

Prior to the start of trial, defendant LiButti moved the court for an order precluding the Government from impeaching him if he took the stand in his defense on the basis of his 1977 tax conviction and his admitted prior use of aliases. The court denied the motion in an oral Opinion delivered February 10, 1994. See Tr. 2/10/94 at 6-14. The court had previously ruled such evidence inadmissible in the Government's case-in-chief, *see* Opinion filed December 10, 1993 at 13, but the court made no determination whether that the evidence would be admissible for purposes of impeaching defendant's credibility if he made the decision to testify, *id.* at 13 n. 7. Mr. LiButti did not testify, and he alleges that the court's ruling on his motion in limine was critical in making the decision not to testify,[19]

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[19] As of the time when the oral opinion was rendered, defense counsel confirmed that defendant LiButti had made no decision whether or not to testify, *regardless* of the outcome of defendant's motion to preclude use of the 1977 conviction. *See* Tr. 2/10/94 at 4:22 to 6:5. Against this background, defendant's argument that the court's ruling "substantially prejudiced Mr. LiButti's defense because Mr. LiButti would have testified but for that ruling" (Def. Br. at 33) would appear to ascribe certainty to Mr. LiButti's decision where none existed. Moreover, the February 10th ruling came at the end of the government's case, three days after the government rested, and two days after Rule 29 motions were decided, when the precise contours of the case against him was known, and yet defense counsel was unable to confirm that his client intended to testify if the 1977 conviction were excluded, stating in colloquy with the court, "Is there a

and argues that the court's decision was erroneous and substantially prejudiced his defense.[20]

As set forth in the court's February 10, 1994 oral Opinion, the court's decision was guided by Rules 609(a)(2) and (b), Fed.R.Evid. The evidence sought to be precluded was defendant's conviction in 1977 on a felony count of filing a false income tax return in violation of 26 U.S.C. § 7206(1). That conviction was entered pursuant to a guilty plea by defendant for failing to disclose certain horse transactions on his 1970 federal income tax return. The defendant did not gain income from the unreported transactions, but the return was nonetheless knowingly and willfully false as a consequence of defendant's failure to include the transactions, as he admitted in pleading guilty in this court in 1977. Because of the falsity, the conviction is relevant to the jury's assessment of defendant's honesty if he were to take the stand. Further, the defendant's credibility as a witness in explaining the circumstances of his allegedly deceptive conduct (Count 1) and of his allegedly fraudulent conduct (Counts 4 & 5) would be a key element of the trial because his fundamental credibility and honesty were at stake in these charges. Although the conviction related to Mr. LiButti's tax return for 1970, some 24 years ago, the court noted

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possibility that if your honor rules it out that he still may not testify? Absolutely." Tr. 2/10/94 at 5:25 to 6:1.

[20] Nowhere does counsel indicate what Mr. LiButti might have testified about if he had taken the witness stand, nor how the defense was deprived of evidence that was presumably in the knowledge of witnesses other than Mr. LiButti who could have been called to testify. It is difficult to assess any claim of prejudice from not testifying where the subject matter of the testimony is unknown.

that the evidence would nonetheless be probative in this case, which relates in part to evasion of payment taxes for the very same 1970 tax year is the amount of $435,881 plus penalties and interest. Tr. 2/10/94 at 10.[21] The conviction was also found to be highly relevant to Mr. LiButti's intent in allegedly structuring certain transactions in a way to evade payment of taxes for the 1970 tax year, as charged in this case, Tr. 2/10/94 at 11, because of his proclaimed intent (disclosed to IRS District Counsel Magnone, discussed above) to see to it that the IRS would never collect a penny of the disputed 1970 tax liability. It would be strongly probative for the jury to understand that Mr. LiButti's anti-IRS animus in the 1980's could stem from his 1977 conviction for filing the false 1970 return.

The court denied defendant's motion and ordered that the Government could use the conviction for purposes of impeachment, finding "in the interest of justice, that the probative value of the conviction is supported by the specific facts that have been laid out, and that the probative value substantially outweighs the prejudicial effect." Tr. 2-10-94 at 11:4-8. *See United States v. Greeley*, 471 F.2d 25, 26 (3d Cir. 1972) (citing the then-proposed

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[21] The 24 years from 1970 to 1994 had as its common thread the continued dispute between the United States and Mr. LiButti, in criminal court (1977) and in the Tax Court judgment, affirmed in the Third Circuit (1986) for 1970 tax liability including a fraud assessment with the continuing efforts from 1986 until the time of the Fourth Superseding Indictment (1994) to allegedly conceal assets which could have satisfied the 1970 tax liability and fraud penalty and interest.

version of Rule 609(a) & (b), holding that the use of 12-year old robbery conviction for impeachment purposes was not abuse of discretion); *see also United States v. Cavender*, 478 F.2d 528 (4th Cir. 1978); *United States v. Mahler*, 579 F.2d 730, 734 (2d Cir.), *cert. denied*, 99 S. Ct. 592 (1978); *United States v. Amerson*, 938 F.2d 116 (8th Cir. 1991). This ruling was well within the court's discretion under Fed.R.Evid. 609(b).[22]

Finally, there was no error in the court's decision not to preclude use, for impeachment purposes, of the defendant's prior use of aliases. The government did not propose to use aliases to introduce unsavory conduct. The defendant would have had the opportunity to explain any innocent use of such aliases, and such information might be relevant to the question of Mr. LiButti's honesty, which would be of substantial interest if Mr. LiButti testified. *See* Tr. 2/10/94 at 15.

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[22] In the same Oral Opinion on February 10, 1994, this court precluded the Government from introducing evidence of defendant's alleged use of nominees to conceal his ownership interest in horses from 1968 to 1971, which was a central issue of the Tax Court case, determined adversely to defendant pertaining to the 1970 and 1971 tax returns. The determination was made pursuant to Rules 404(b) and 403, Fed. R. Evid., see Tr. 2/10/94 at 6-7, 11-14. Thus, even though the jury would learn of the defendant's conviction for filing the false 1970 income tax return, they would not have learned of the related circumstances of defendant's 1968-71 use of a nominee owner for a valuable thoroughbred horse, nor would the jury have been called upon to assess whether defendant had a longstanding practice of such misconduct predating the matters charged in Count 1. This determination obviously further limited any prejudicial impact of the admissibility, for impeachment purposes, of the 1977 conviction.

IX. Defendant's Argument That The Government Acted Unconstitutionally, Vindictively, and Outrageously

Defendant's final contention on his motion for post-trial relief is that the Government acted unconstitutionally, vindictively and outrageously by knowingly "permitting" him to gamble away hundreds of thousands of dollars instead of seizing those funds, and by prosecuting him to induce him to pay his tax deficiencies. The defendant asserts that the IRS failed to take aggressive enforcement action after the 1986 assessment and the IRS thus "permitted" defendant to compound his financial problems as he continued to gamble. Defendant fails to cite the court to any pertinent authority, and neither of these arguments serve to undermine the jury's verdict in the case. No evidence supports any inference of vindictive behavior by the IRS or the prosecutors toward Mr. LiButti. Given all that Mr. LiButti has done over the years at issue in this case to avoid payment of even 5 cents in taxes upon millions of dollars in income, it is quite galling that this defendant would seek to blame his crimes upon his Government. The verdict will not be set aside on either of these grounds.

Conclusion

For the reasons set forth herein, the court will deny defendant's motion for post-trial relief. The accompanying Order is entered.

September 6, 1994
Date

/s/
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA	:	
v.	:	Criminal Action
	:	No. 92-611 (JBS)
ROBERT LIBUTTI,	:	
Defendant	:	(Filed Sep. 6, 1994)

ORDER

This matter having come before the court upon the post-trial motion of defendant, Robert LiButti, for a judgment of acquittal or, in the alternative, for a new trial; and the court having considered the submissions of the parties and having heard oral argument on May 20, 1994; for the reasons stated in the Opinion of today's date;

IT IS this 6th day of September, 1994 hereby

ORDERED that defendant's motion for a judgment of acquittal or for a new trial is DENIED.

/s/
JEROME B. SIMANDLE
U.S. DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 95-5000

UNITED STATES OF AMERICA

v.

ROBERT LIBUTTI, *Appellant*

D.C. Criminal No. 92-cr-00611-2

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, McKEE, SAROKIN, *Circuit Judges* and COHILL,* *District Judge*

SUR PETITION FOR PANEL REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing filed by appellant having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges in active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service

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* As to panel rehearing only.

not having voted for rehearing by the court in banc, the petition for rehearing is DENIED.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

DATED: JAN 25 1996